Illinois Law: Case Decisions & Trends

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ILLINOIS LEGISLATION

1. Public Act 101-0048: Illinois Trust Code
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Creates the Illinois Trust Code. Provides that the Code applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. Defines terms. Adds provisions governing: judicial proceedings; representation; creation, validity, modification, and termination of trusts; creditor's claims; spendthrift and discretionary trusts; revocable trusts; the office of trustee; duties and powers of the trustee; the Illinois Prudent Investor Law; life insurance; affiliated investments; liability of trustees and rights of persons dealing with a trustee; total return trusts; trust decanting; the Uniform Powers of Appointment Law; perpetuities; and application of the Code to existing trusts. Repeals the Trusts and Trustees Act, the Trusts and Dissolutions of Marriage Act, the Uniform Powers of Appointment Act (added by Public Act 100-1044), the Statute Concerning Perpetuities, the Perpetuities Vesting Act, and the Trust Accumulation Act. Makes corresponding changes in the Public Use Trust Act, the Township Code, the Corporate Fiduciary Act, the Community-Integrated Living Arrangements Licensure and Certification Act, the Title Insurance Act, the Illinois Funeral or Burial Funds Act, the Mental Health and Developmental Disabilities Code, the Illinois Marriage and Dissolution of Marriage Act, the Probate Act of 1975, the Illinois Power of Attorney Act, the Common Trust Fund Act, the Religious Corporation Act, and the Illinois Pre-Need Cemetery Sales Act.

2. Public Act 101-0182: Amends the Probate Act to Expand Disinheritance for Abuse
(HB 347) – effective 1/1/20

Amends the Probate Act of 1975. Provides that a person convicted of assault, aggravated assault, battery, or aggravated battery of an elderly person shall not receive any property, benefit, or other interest by reason of the death of that elderly person.

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3. Public Act 101-0120: Guardianship and Administrative Separation of Parents
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Amends the Probate Act of 1975. Defines "administrative separation". Provides that a court lacks jurisdiction to proceed on a petition for the appointment of a guardian or standby guardian of a minor if it finds that the minor has a living parent whose parental rights have not been terminated, unless, among other things, the parent or parents, in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit. Provides that a parent or guardian shall not appoint a short-term guardian of a minor if the minor has another living parent whose parental rights have not been terminated, unless, among other things, the parent or parents, in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit. Makes conforming changes.

House Floor Amendment No. 1
Deletes reference to: 755 ILCS 5/11-10.1

Replaces everything after the enacting clause with the provisions of the introduced bill with the following changes: (1) changes the definition of "administrative separation"; (2) provides that the court lacks jurisdiction to proceed on a petition for the appointment of a guardian or standby guardian of a minor if the minor has a living parent, adoptive parent, or adjudicated parent, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions, unless the parent or parents, due to an administrative separation, are unable to give consent to the appointment in person or by a notarized, written document as evidenced by a sworn affidavit describing the parent's or parents' inability to receive notice or give consent (rather than the parent or parents, in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit describing the present location of the parent out of the country and the attempts made to contact the parent); (3) deletes language providing that a parent or guardian shall not appoint a short-term guardian of a minor if the minor has another living parent, adoptive parent, or adjudicated parent whose whereabouts are known, and who is willing to carry out day-to-day child care decisions unless the parent or parents in the event of an administrative separation, are not presently located in the United States and are unable to consent as evidenced by a sworn affidavit describing the present location of the parent out of the country and the attempts made to contact the parent; (4) provides that a short-term guardian who was appointed as the result of an administrative separation may renew a short-term guardianship for an additional 365 days from the date the initial appointment expires if the administrative separation is still in effect, unless the written instrument provides for the appointment to terminate upon a different date or event; (5) deletes language providing that the petition for guardian or standby guardian of a minor must state the facts concerning any administrative separation proceeding; (6) provides specific facts that the petition for guardian or standby guardian of a minor must include and that documentation related to an administrative separation shall be attached to the petition as an exhibit; and (7) deletes language providing that failure to give notice to any relative or parent out of the country is not jurisdictional if the petitioner can attest to specific factors. Makes conforming changes.

4. Public Act 101-0520: Uniform Partition of Heirs Property Act
(HB 3677) – effective 8/23/19

Creates the Uniform Partition of Heirs Property Act. Defines terms. Provides for: applicability; relation to other law; service; notice by posting; commissioners; determination of value; cotenant buyout; partition alternatives; considerations for partition in kind; open-market sale, sealed bids, or auction; and report of open-market sale. Makes conforming changes in the Code of Civil Procedure.

Senate Committee Amendment No. 1
Replaces everything after the enacting clause with the provisions of the introduced bill, and makes the following changes: Changes the definition of "heirs property" and "partition by sale". Defines "fair market value". Provides that if the court determines that the evidentiary value of an appraisal is outweighed by the cost of the appraisal, the court shall order the plaintiff to send notice (rather than the court shall send notice) to the parties of the fair market value of the property. Provides that if an appraisal is conducted, not later than 10 days after the appraisal is filed, the court shall order the plaintiff to send notice (rather than the court shall send notice) to

each party with a known address. Provides that after a hearing to determine the fair market value of the property, the court shall order the plaintiff to send notice to all of the parties of the value and a cotenant's buyout rights (rather than the court shall send notice to the parties of the value). Provides that after the determination of the value, the court shall order the plaintiff to send notice (rather than the court shall send notice) to the parties that any cotenant may buy all the interests of the cotenants that requested partition by sale. Provides that after the expiration period, if no cotenant elects to buy all the interests of the cotenants that requested partition by sale, the court shall order the plaintiff to send notice (rather than the court shall send notice) to all the parties of that fact and resolve the partition. Provides that cotenants must pay their apportioned price to the clerk of court or as otherwise ordered by the court (rather than into the court). Provides that if one or more, but not all, of the electing cotenants fail to pay their apportioned price on time, the court shall order the plaintiff to give notice (rather than the court shall give notice) to the electing cotenants that paid their apportioned price of the interest remaining and the price for all that interest. Provides that the court, in determining whether partition in kind would result in manifest prejudice to the cotenants as a group, shall consider the tax consequences. Provides that if the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default judgment, if their interests were not brought, a party of the property representing the combined interests of those cotenants as determined by the court. Provides that the court shall apportion the costs of the proceedings for the partition of heirs property among the parties in interest in the action, as the court deems just and equitable.

Senate Floor Amendment No. 2
Provides that if the court orders partition in kind, the court shall allocate to the cotenants that are unknown, unlocatable, or the subject of a default judgment, if their interests were not bought out (rather than brought) pursuant to a provision regarding cotenant buyout, a party of the property representing the combined interests of those cotenants as determined by the court.

5. Public Act 101-0526: Amends Child Labor Law Regarding Child Performers
(SB 147) – effective 1/1/20

Amends the Child Labor Law. Provides that, before a child may be issued a permit to work as a child performer, a trust account must be established providing, at a minimum, that: at least 15% (or a greater percentage as determined by rule) of the gross earnings of the child performer shall be deposited into the account; the funds in the account shall be available only to the child performer; the funds shall be held by a bank, corporate fiduciary, or trust company, as those terms are defined in the Corporate Fiduciary Act; and the funds in the account shall become available to the child performer upon the child performer attaining the age of 16 years. Provides that the new provisions do not apply to an employer of a child performer employed to perform services as an extra, services as a background performer, or services in a similar capacity. Provides that the Department of Labor shall adopt rules to implement the provisions.

Senate Floor Amendment No. 1
Provides that funds placed into a trust account for a child performer shall remain in the account until the child performer attains the age of 18, instead of 16, or until the child performer is declared emancipated. Requires trusts to meet the requirements of the Illinois Uniform Transfers to Minors Act. Provides that if a parent or guardian fails to provide to an employer information necessary to transfer funds into a trust account within 30 days after the expiration of

a temporary employment certificate, the employer shall transfer the funds to the State treasurer in accordance with the Revised Uniform Unclaimed Property Act.

House Committee Amendment No. 1
Provides that upon the failure of a parent or guardian to provide to an employer information necessary to transfer funds into a trust account within 30 days after an employment certificate has been issued (rather than within 30 days of a temporary employment certificate having expired), the employer shall transfer the funds to the State Treasurer in accordance with the Revised Uniform Unclaimed Property Act.

House Floor Amendment No. 3
Provides that the Department of Labor shall prescribe the form of the temporary employment certificate and make it available on its website. Removes the authorization to increase by rule the amount of gross earnings that must be deposited into the trust account. Provides that the Department of Labor may, rather than shall, adopt rules relating to trust fund accounts.

6. Public Act 101-0163: Feasibility of Statewide Registry for Advanced Directives; Electronic Declarations

(SB 182) – effective 1/1/20 (The study must be filed with the General Assembly on or before 1/1/21)

Amends the Department of Public Health Powers and Duties Law of the Civil Administrative Code of Illinois. Provides that the Department of Public Health shall study the feasibility of creating a statewide registry of advance directives and Practitioner Order for Life-Sustaining Treatment forms. Amends the Illinois Living Will Act, the Health Care Surrogate Act, the Mental Health Treatment Preferences Declaration Act, and the Powers of Attorney for Health Care Law of the Illinois Power of Attorney Act. Provides that various types of documents may be in hard copy or electronic format. Provides that electronic declarations may be revoked, among other things, by deletion in a manner indicating the intention to revoke and in a manner that meets the requirements for a deletion by a provider deleting an entry in the electronic medical record. Provides that signature and execution requirements are satisfied by written signatures or initials and electronic signatures or computer-generated signature codes that meet the requirements for a signature by a provider making an entry into the electronic medical record. Provides that a person who enters information in an electronic system under the persona of the principal shall be held civilly liable. Makes conforming changes.

Senate Floor Amendment No. 1
Adds reference to: 5 ILCS 175/5-115; 5 ILCS 175/5-120

Replaces everything after the enacting clause with the provisions of the introduced bill, and makes the following changes: Provides that the Department of Public Health shall also consult with a statewide bar association, a national bar association with an Illinois chapter that concentrates in elder and disability law, and a not-for-profit organ procurement organization that coordinates organ and tissue donation in the study of the feasibility of creating a statewide registry of advance directives and POLST forms. Provides that the study must be filed with the General Assembly on or before January 1, 2021. Provides that an electronic declaration may be created, signed, or revoked electronically using a generic, technology-neutral system in which each user is assigned a unique identifier that is securely maintained and in a manner that meets the regulatory requirements for a digital or electronic signature. Deletes language providing that

the signature and execution requirements are satisfied by electronic signatures or computer-generated signature codes that meet the requirements for a signature by a provider making an entry into the medical record. Deletes language providing that an electronic declaration may also be revoked by the principal's deletion in a manner indicating the intention to revoke and in a manner that meets the requirements for a deletion by a provider deleting an entry in the electronic medical records. Amends the Electronic Commerce Security Act. Deletes language providing that provisions regarding electronic records and electronic signatures shall not apply to any rule of law governing the creation or execution of a living will or healthcare power of attorney.

7. Public Act 101-0342: *De Minimis* Unclaimed Property

(SB 1614) – effective 8/9/19

Amends the Revised Uniform Unclaimed Property Act. Provides that an heir or agent who files an unclaimed property claim in which the decedent's property does not exceed $100 may submit an affidavit attesting to the heir's or agent's capacity to claim in lieu of submitting a certified copy to verify a claim. Provides that the affidavit shall be accompanied by a copy of other documentary proof that the State Treasurer requests. Provides that the State Treasurer may change the maximum value by administrative rule.

<u>ILLINOIS CASE LAW</u>

WILLS

1. <u>Siedler v. Hopkins</u>, 2019 IL App (5th) 180574 (August 28, 2019)

In determining purchase price under option granted in will, the term "third party purchaser" excludes legatees.

In this will construction action, the will of Vincent Siedler granted to petitioner an option to purchase the estate's real property at the greater of the appraised value or "the purchase price offered by any *bona fide* third party purchaser."

The appraiser initially valued the real estate at $371,000, but after a request from two residual legatees (the respondents), the property was re-appraised at $398,000. After the petitioner had exercised his option and the executor asked the court to authorize the sale, respondent Cody Hopkins, a residual legatee as to 26.66% of the estate, made an offer to purchase the property for $491,220.

The executor filed a petition asking the court for direction regarding the sale of the real estate in light of Hopkins's offer. The parties did not present any evidence or witness testimony, agreeing that the issues before the court were legal issues. No issues were raised as to whether Hopkins's offer was "*bona fide.*" The circuit court ruled that a legatee under the will did not qualify as a "third party purchaser" and concluded that petitioner was not required to match Hopkins's offer.

Hopkins appealed, but the appellate court affirmed, reviewing the interpretation of the will as a matter of law *de novo*. The appellate court found no definition of "third party purchaser" in the will, and neither party nor the court's own research revealed any cases on the specific issue. Nevertheless, considering the plain and ordinary meaning of the term "third party purchaser," the court concluded that the testator intended for petitioner to match only *bona fide* offers from purchasers who were strangers to the will, not offers from residual legatees.

The court further reasoned that, "[a] holding that legatees under the will can make "third party" offers that [petitioner] must match would be, essentially, a holding that anyone and everyone who makes a *bona fide* offer qualifies as a 'third party purchaser.' This interpretation would improperly treat [testator's] chosen term 'third party purchaser' as meaningless surplusage."

TRUSTS

1. <u>Chicago Police Sergeant's Association v. John Pallohusky</u>, 2019 IL App (1st) 181194 (March 29, 2019)

Doctrine of merger applied to invalidate testamentary trust despite the existence of remainder beneficiaries.

John Pallohusky is a former president of the Chicago Police Sergeants' Association Policemen's Benevolent & Protective Association, Unit 156A. On April 17, 2012, Pallohusky pled guilty to embezzling over $1,000,000 from the Association. The Association had sued Pallohusky on

June 7, 2010, seeking a turnover of a survivor annuity paid to him from the pension of his wife, Mary O'Toole, a case in which the appellate court reversed the trial court, holding that the annuity was exempt from collection proceedings. This case involves a testamentary trust established by Mary O'Toole in her last will dated July 6, 2010, which she executed the day before she died.

Ms. O'Toole's will gave the residue of her estate "to the trustee of the Trust for the benefit of [her] Husband, John Pallohusky (John Pallohusky Trust)." The residue consisted of the single family home in which Pallohusky and O'Toole had resided, which she alone purchased and owned in its entirety before her death. The terms of Ms. O'Toole's will named Pallohusky as trustee, with her sister Eleanor Kobit and then Chase Bank as successor trustees. Any trustee could resign by giving thirty days notice to the named successor trustee.

The trustee had discretion to distribute income, and if income was insufficient, principal, to Pallohusky "for his health (including rehabilitation for any disorder mental or physical), maintenance, education and reasonable comfort and best interests." Further, the trust provided that the "assets of the Trust, including the residential property are for the benefit of the beneficiary (John Pallohusky) for his lifetime," and "[i]f at any time the Trustee determines that the assets of the Trust should be sold, for his health (including rehabilitation for any disorder mental or physical), maintenance, education and reasonable comfort and best interests the proceeds from the sale shall be included in the Trust." Upon Pallohusky's death, the remaining assets in the Trust were to be distributed *per capita* to the then-living heirs of Mary O'Toole. Mary's sister Eleanor Kobit replaced Pallohusky as executor on September 18, 2014, and Pallohusky resigned as trustee of the testamentary trust on February 23, 2015. As executor, Ms. Kobit executed a deed transferring the marital residence from the estate to the testamentary trust on May 7, 2015. The trust provisions also gave the trustee typical powers, including the power to sell real estate held in the trust.

After Pallohusky pled guilty to embezzlement, the Association obtained a judgment against him on July 30, 2013 in the amount of $690,215.17. The Association sought a citation to discover assets from the testamentary trust of Ms. O'Toole, seeking to recover its judgment from the property bequeathed to Pallohusky as trustee.

Following a hearing during which testimony was heard as to Ms. O'Toole's intent in creating the trust, the circuit court found that the trust was invalid and the property could be sold to satisfy the judgment against Pallohusky. The circuit court found that because Pallohusky was both trustee and sole beneficiary, and he "waited unreasonably long to resign his interest as sole beneficiary or trustee," the trust was terminated under the merger doctrine.

On appeal, the trustee argued that Section 2-1403 of the Code of Civil Procedure protected property held in trust "if such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor." Because O'Toole, not Pallohusky, established the trust, and no evidence indicated that she acted in bad faith in doing so, the trustee asked the appellate court to reverse the circuit court's order turning over the real estate to the Association, arguing that Pallohusky was not the sole beneficiary, and in the alternative, that his resignation as trustee before the property was conveyed to the trust avoided the merger doctrine. The trustee also argue that Pallohusky had only a lifetime interest in the trust property, and a sale to satisfy his creditors would be at the expense of the remainder beneficiaries.

The appellate court disagreed with the trustee and affirmed the circuit court. The appellate court reasoned that Ms. O'Toole's will gave the property in trust "for the benefit of [her] husband, John Pallohusky," and named no other beneficiaries (despite the remainder beneficiaries being named as Mary O'Toole's heirs). The appellate court continued and, while recognizing that "Ms. O'Toole's heirs need not be named to have an ascertainable beneficial interest, wrote that "the scope of the interest left to her husband and the extent of his powers as trustee negated any genuine contingent beneficial interest for Ms. O'Toole's heirs." The appellate court even wrote, "[t]here was nothing that the unnamed heirs could do to prevent Mr. Pallohusky from dealing with the property as he wished."

Moreover, because this was a testamentary trust, the real estate in question was transferred to the trust automatically upon O'Toole's death, regardless of whether it was formally transferred until five years later. The will itself transferred the property to the trust, of which Pallohusky was trustee and sole beneficiary for five years, so he did not promptly resigna as trustee according to the appellate court.

In short, the appellate court found that Pallohusky was "the Trust's sole real beneficiary," and that the heirs of Ms. O'Toole who were identified as the remainder beneficiaries "had no right to protection from Mr. Pallohusky using the Trust property and proceeds solely for his own benefit." Moreover, the appellate court found all of this without regard to any of the testimony regarding Ms. O'Toole's intent in creating the trust, finding that Ms. O'Toole's intent "to create a sham trust" was clear and unambiguous from the document itself.

> **COMMENT:** There was a questionable application of the doctrine of merger in this case. If the doctrine of merger applies to invalidate the trust created by Ms. O'Toole, thousands of Illinois trusts would be a risk of failing due to the merger doctrine, where the surviving spouse is both trustee and lifetime beneficiary. The powers given to the trustee, whether Pallohusky or a successor, were not at all out of the ordinary. And of course, a trustee's fiduciary duties include a duty to act impartially towards the trust's beneficiaries, including the remainder beneficiaries, who (as correctly pointed out by the appellate court) do not have to be specifically named but can be named by group or class. It seems particularly relevant to the outcome of this case that the plaintiff was a policemen's benevolent association, and the defendant was someone who pled guilty to embezzling from that association.

2. Trackman v. Michela, 2019 IL App (2d) 190131 (Nov. 20, 2019)

***Res judicata* bars undue influence and tortious claim due to previous count for lack of capacity being dismissed with prejudice.**

Mark Trackman and his sister, Laurel Michela, were the children of Marcella Trackman. This is a procedural case, so without reciting all the underlying facts (which were sparse in the opinion), after their mother's death, plaintiff Mark filed a three-count complaint against his sister, her children, and his own children.

Mark's complaint alleged: (I) the defendant tortiously interfered with plaintiff's expectation of an inheritance, (II) the defendant asserted undue influence over the decedent, causing her to amend her trust in 2007 (seeking rescission), and (III) the decedent lacked testamentary capacity when she amended her trust in 2007 (seeking rescission). Each count, as is typically seen in a complaint, incorporated by reference the facts alleged in the prior counts.

The trial court dismissed all three counts of Mark's complaint with prejudice pursuant to 735 ILCS 5/2-615, for failing to state a claim upon which relief could be granted, and Mark appealed. The appellate court in that case affirmed the dismissal of count III (lack of capacity) with prejudice, but reversed the trial court on the dismissal of counts I (tortious interference) and II (undue influence). The plaintiff had conceded dismissal of count III in the first appeal.

On remand, plaintiff filed his fifth amended complaint, containing only counts I and II. However, over a year later and shortly before the trial date, the plaintiff moved for voluntarily dismissal of his fifth amended complaint. The trial court granted that motion, and wrote, "[t]he Plaintiff is given leave to dismiss this lawsuit without prejudice and with leave to refile within the time provided by rule." The court in this case refers to the proceedings up to this point as "*Trackman I*."

The plaintiff subsequently filed a one-count complaint against his sister in Illinois for tortious interference with an expectancy. As the court put it, "[t]he complaint's factual allegations were drawn from the fifth amended complaint, which in the main had repeated those of the fourth amended complaint."

The defendant moved to dismiss the complaint a barred by *res judicata*, on the basis of Mark's Count III, alleging lack of testamentary capacity, having been dismissed with prejudice in *Trackman I*. Defendant argued that count III had sought rescission of the 2007 trust amendment, and that the two causes of action were the same because they relied on the same operative facts. Therefore, according to defendant, plaintiff was attempting to relitigate a claim that had been litigated, or could have been litigated, in *Trackman I*.

Defendant maintained that the fifth amended complaint (the one he voluntarily dismissed) added factual allegations that were based on evidence discovered since remand; and that the order of voluntary dismissal specifically allowed him to refile the complaint. The trial court agreement with the defendant and dismissed the complaint.

The appellate court affirmed the dismissal of the complaint as barred by *res judicata*. There are three requirements for *res judicata* to bar an action: (1) a final judgment on the merits, (2) an identity of parties in the two actions, and (3) an identity of causes of action. Plaintiff conceded that there was an identity of parties in the two actions.

In response to plaintiff's argument that the causes of action were not the same, the appellate court reasoned as follows:

> Illinois law uses the "transactional test" to determine whether two causes of action are identical for *res judicata* purposes. The transactional test considers whether the claims arise from a common core of operative facts. This depends in turn on a pragmatic consideration of whether the facts are related in time, space, origin, or motivation and form a convenient trial unit.
>
> Under this test, count III *Trackman I* and the single count in [this case] are the same for *res judicata* purposes. As defendant notes, count III pleaded the same facts (incorporated by reference) as did count I for tortious interference, which was the predecessor to the present complaint. More importantly, though, count III and [this complaint] are based on the same core of operative facts, even though their theories and factual bases are not identical. Both are based on Marcella's

> conduct in creating trust documents that excluded plaintiff from any inheritance. Both allege the same harm. That they would have formed a convenient trial unit is self-evident and also shown by plaintiff's having pleaded both theories in *Trackman I*.

Again, the appellate court held that the plaintiff's prior claim to rescind Marcella's trust amendment for lack of capacity *was the same for purposes of* res judicata as the claim against plaintiff's sister for tortious interference.

Plaintiff argued that there was no final judgment on the merits, because the appellate court had remanded the prior cause with directions to allow plaintiff to continue his actions on counts I and II of the original complaint. Plaintiff further argued that the trial court order allowing his voluntary dismissal expressly allowed him to refile. The court responded:

> Plaintiff is correct that, upon remand, he could still pursue relief on counts I and II. Indeed, he started out doing so by filing the fifth amended complaint, which included counts I and II. *Res judicata* did not apply, for the simple reason that this was still *Trackman I*. Had plaintiff continued to pursue *Trackman I*, *res judicata* could not have barred the fifth amended complaint—although it would have barred adding count III back in.
>
> But the situation changed when plaintiff voluntarily dismissed *Trackman I* and then filed *Trackman II*. *Trackman II* was not a continuation of *Trackman I* but rather an entirely new action. *Res judicata* could apply, because now there was a prior action. That prior action included a final judgment on the merits on count III. And although plaintiff did not replead count III, he pleaded a claim that arose from the same core of operative facts and sought relief against the same party.

The court quoted the Illinois Supreme Court case *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325 (1996): "a plaintiff who splits his claims by voluntarily dismissing and refiling part of an action after a final judgment has been entered on another part of the case subjects himself to a *res judicata* defense." In this case, "there was a final judgment on the merits in the first action, a new action, and an identity of parties and causes of action between the two. That is what matters."

Notably, the appellate court relied to some extent on the fact that count III in the original case, asserting lack of capacity, which was ultimately dismissed with prejudice, had incorporated by reference the facts laid out in counts I and II. Count I was essentially the tortious interference that plaintiff filed in *Trackman II*. Was it necessary to incorporate all of the factual allegations relating to tortious interference into the count alleged lack of capacity? Would the result of this case have been different if the order of the counts in the *Trackman I* complaint was different?

EXECUTORS, ADMINISTRATORS, AND TRUSTEES

1. *In re* Estate of John A. Bohn, Jr., 2019 IL App (1st) 173083 (March 28, 2019)

Dismissal of *quantum meruit* claim for caregiving services was reversed as based on insufficient evidence.

John A. Bohn, Jr. died on February 7, 2016, at age 57, without a will. His father, John A. Bohn, Sr. opened his intestate probate estate and was appointed administrator. John, Jr.'s estate contained a nominal amount of money and real estate worth about $100,000. The administrator published a statutory claims notice, informing potential creditors that claims must be filed against the estate by October 11, 2016.

In August, 2016, Patricia Buczkiewicz filed a *pro se* complaint against the Estate of John, Jr., alleging that: she and the decedent met in 1976 and lived together for 40 years without marrying; she and the decedent moved into a residence in Northlake, Illinois in 1998 (the real estate in the decedent's estate); that while the decedent worked, she stayed home and performed various household chores; that she never received compensation for her work over the years. Buczkiewicz sought "*quantum meruit* support during her life", an opportunity to be heard, and "what's fair."

The administrator moved to dismiss Buczkiewicz's claim, arguing that she lacked standing and was not an interested person because she never filed a timely claim with the estate. Further, Buczkiewicz had been evicted from the residence by order of the court, and had raised the same claim about caregiving services during the eviction proceedings, where it had been deemed unfounded by the circuit court.

Bohn, Sr. alleged that his son bought the Northlake residence in 1998, but had moved to the property in question not with Buczkiewicz but with his parents, who stayed there until 2007, when they left and decedent allowed Buczkiewicz to live in one room of the residence. The administrator claimed that in 2009, the decedent and Buczkiewicz fought about her "hoarding habits" and he moved to Chicago, where he remained until his death in February, 2016.

Meanwhile, the administrator alleged, Buczkiewicz remained in the property. The decedent had given her a 30-day eviction notice in November 2011 and filed a forcible detainer action seeking her eviction in 2012. Although he obtained an order of possession, he did not enforce it. After the decedent's death, the administrator obtained an order of possession on behalf of the estate on October 20, 2016, and did enforce it. After obtaining possession, the administrator claimed the house was "uninhabitable" at the time and cost thousands of dollars to clean. The administrator further claimed that Buczkiewicz never paid rent, taxes, insurance, or utilities on the residence and had no legal relationship with the decedent and never provided services to him.

The administrator attached multiple documents to his reply, including photographs allegedly from the house showing garbage bags strewn all over the residence, including "human feces" on the ground.

The circuit court granted the motion to dismiss Buczkiewicz's motion with prejudice, finding that Buczkiewicz timely filed a claim and had standing, but "based on the pictures attached to the estate's reply" held "as a matter of law that Ms. Buczkiewicz was incapable of providing caregiving services to decedent." Buczkiewicz appealed under Rule 304(b)(1).

On appeal, Buczkiewicz argued that the court erred by holding that, as a matter of law, she was incapable of providing caregiving services based solely on unauthenticated photographs attached to a reply on the administrator's motion to dismiss. The appellate court agreed with the circuit court that Buczkiewicz had timely filed a claim by filing her *pro se* complaint against the estate within he statutory claims period.

The appellate court noted that, "[d]ifferent presumptions apply to the value of services provided to the decedent while he was alive, depending on who provided them. If the services were provided by someone who is related to the decedent, there is a rebuttable presumption that they were done gratuitously without an expectation of payment. If the services were provided by someone who is not related to the decedent, there is a rebuttable presumption that they were done with an expectation of payment. However, '[b]lood kinship is not necessary in order to raise' the presumption of gratuitous service.'" (citing *In re Estate of Walsh*, 2012 Il App (2d) 110938).

The appellate court also acknowledged that "procedures under the Probate Act afford wide latitude to the circuit court in its adjudication of claims," but that because the probate court dismissed Buczkiewicz's claim as a matter of law, its review in this case was *de novo*. The appellate court noted that "there [was] no indication from the record that the circuit court held an evidentiary hearing to determine, for example, what presumption applied to Buczkiewicz's claim … and ultimately whether or not her claim was meritorious."

Instead, the circuit court appeared to have dismissed the claim as a matter of law "based solely on unauthenticated photographs from the Northlake residence. The appellate court found that the circuit court "apparently accepted the word of the estate without any foundation" that the photographs accurately depicted the residence in question, who took the photographs, and when they were taken.

The court also emphasized that even if the photographs were entirely representative and accurate, they were taken, at the earliest, in October, 2016 when the administrator gained possession of the property, and were not relevant to the time period of Buczkiewicz's claim, which began when she alleged they met in 1976 until his death in February, 2016. The photographs did not warrant the assumption that the house had been in disrepair for a decade or reflect in any way on the 22 years of their relationship prior to the house being purchased in 1998.

The appellate court expressed no opinion as to the merit of Buczkiewicz's claim, but instead found that the circuit court erred when it dismissed her claim as meritless as a matter of law based on putative photographs of the house in disrepair in October 2016, as "there were plainly factual issues that needed to be resolved." The appellate court, therefore, reversed the circuit court's decision and remanded for further proceedings.

2. *In re* Estate of Carol Mattson, 2019 IL App (1st) 180805 (April 30, 2019)

Individual cannot petition *pro se* to be appointed administrator (at least in Cook County).

Carol Mattson was survived by three adult children as her heirs. One of Mattson's sons, Daniel Houlihan, a non-attorney proceeding *pro se*, petitioned the Circuit Court of Cook County to open an estate for his mother, Carol Mattson, and for issuance of letters of administration, appointing him as independent administrator of her estate. On three separate occasions, the court advised Daniel that he could not represent the legal interests of an estate as anon-attorney and continued the case in order "for [an] attorney to appear." Ultimately, the court denied Daniel's petition to be appointed as the administrator of Mattson's estate without prejudice, because he failed to obtain counsel to represent the decedent's estate and "could not represent the legal interests of an estate as a non-attorney."

Daniel, still acting *pro se*, appealed the trial court's order denying his petition. The appellate court cited 705 ILCS 205/1 in writing, "[a]n individual not duly authorized to practice law cannot represent another in a court of law." "Moreover, this rule includes a non-attorney seeking to personally represent the legal interests of an estate." (citing *Ratcliffe v. Apantaku*, 318 Ill.App.3d 621 (1st Dist. 2000), the same case cited by the circuit court in denying Daniel's petition). In *Ratcliffe*, a plaintiff was denied the right to proceed pro se as a special administrator in a medical negligence/wrongful death case. While a personal representative need not be an attorney, "one who seeks to represent the legal interests of the personal representative must be an attorney." Further, from Daniel's brief, "it [was] apparent that he [sought] not only to pursue his petition to appoint an independent administrator *pro se*, but also intends, as independent administrator, to pursue claims against his sister for allegedly dissipating estate assets.

The appellate court held that Daniel cannot represent the legal interests of the decedent's estate in a pro se capacity, either in the appellate court or in the action below, since he is not a licensed attorney or a party to this suit. The appellate court struck Houlihan's brief and dismissed his appeal.

Justice Hyman issued a dissenting opinion in this case. The dissent emphasized that Daniel, at the preliminary stage of petitioning the probate court to open his mother's estate and appoint him as the administrator, "[was] not representing the legal interests of his mother's estate." Instead, "[h]e represents his own interest in serving as administrator, and need not hire an attorney to file the petition." The dissent pointed out probate forms from other counties that are used to petition for letters of administration, which in include a box to check if the petition is proceeding "*pro se*" (while the Cook County form includes no such option). The majority opinion was not convinced, stating that the forms could not override its analysis. The dissent seems to recognize, however, that once appointed, the administrator would have to hire counsel to represent the interests of the estate.

3. <u>McArdle v. Christensen</u>, 2019 IL App (3d) 170858 (September 25, 2019)

Service of process effective on trustee at address of the trust printed on checks.

After a real estate purchase agreement failed to close, the plaintiff, Phillip McArdle (McArdle), in his capacity as trustee of the Barbara M. McArdle Trust (McArdle Trust), filed a breach of contract and quiet title action against Tad Christensen (Christensen) in his representative capacity as trustee of the Raymond H. Christensen Trust and Beverly J. Christensen Trust (collectively, Christensen Trusts).

Christensen had not completed an address on the real estate contract, but he did sign two earnest money checks, and each check identified Christensen as trustee of the Christensen Trusts and listed an address in Orland Park.

A summons was issued, and substitute service was completed at the address held out on earnest money checks as that of the two Christensen Trusts. Each affidavit of service stated that substitute service was executed on Beverly Buckley, alleged to be Christensen's mother, the "owner" of the Beverly J. Christensen Irrevocable Trust, and the beneficiary of the Raymond H. Christensen Irrevocable Trust.

Christensen neither appeared nor responded, and a default judgment was entered. Christensen filed a motion to quash service of process, alleging that he was not properly served and that the circuit court never obtained personal jurisdiction over him. The circuit court disagreed and denied the motion.

On appeal, Christensen argued that McArdle was required to serve him at his residence—i.e., under the provision of the Code of Civil Procedure addressing service of process on individuals (735 ILCS 5/2-203), and that the failure to do so prevented the court from obtaining personal jurisdiction over him.

The appellate court wrote, "For purposes of litigation, '[a] written trust possesses a distinct legal existence that is recognized by statute [citation] and can sue or be sued *through its trustee in a representative capacity* on behalf of the trust.'" (citing *Sullivan v. Kodsi*, 359 Ill. App. 3d 1005, 1010 (2005) (emphasis added by *McArdle*). In what it called a case of first impression – on the issue of the proper address for service of process on a trustee – the court affirmed the trial court and held that service at the address provided "as the address for the trust" (the only one that had been provided, printed on the checks) was proper.

As to the method of service, in the absence of a registered agent, officers, or employees who can act as agent, leaving process with an adult over the age of 13 found at the address, as in the case of service on an individual, also seems appropriate.

4. <u>Gearhart v. Gearhart</u>, 2020 IL App (1st) 190042 (Nov. 7, 2019; mod. Jan. 23, 2020)

Son-trustee loses summary judgment over interpretation of trust amendment he drafted; liable for punitive damages.

In *Gearhart*, the court found that one of the four children of Lloyd Gearhart had misinterpreted his father's revocable trust document and breached his fiduciary duties to his brother. Lloyd died on January 9, 2012, one week after executing the second amendment to his trust.

Lloyd had four children, David (defendant), John (plaintiff), Jim, and Susan. He had an ex-wife, Marjorie, and a surviving spouse, Dorothy. Lloyd created his revocable trust on April 30, 1994, subsequently amending it twice.

Article III of the original trust agreement governed the distribution of the trust's assets after the grantor's death. First, paragraph 1 of article III provided that the trustee was to pay such sums as required to fulfill the grantor's obligations to Marjorie pursuant to the judgment for dissolution of their marriage. Next, paragraph 2 of article III provided:

> [T]he trustee may in its discretion pay to or use for the benefit of the Grantor's descendants so much of the income and principal as the Trustee determines to be required, in addition to their respective incomes from all other sources known to the trustee, for their reasonable support, comfort and education, adding any excess income to principal at the discretion of the trustee. The trustee may make payments to, or for the benefit of, one or more of them to the exclusion of one or more of them, and may exhaust the principal. The Grantor's concern is primarily for the support, comfort and education of his descendants, rather than the preservation of principal for distribution upon termination of the trust. After the

> death of Grantor and after there is no living child of Grantor under the age of twentyone [sic] years, the trustee shall divide the principal, as then constituted, and any undistributed income, into separate trusts, equal in value, one for each then living child of Grantor and one for the then living descendants, collectively, of each deceased child of Grantor.

Each child of Lloyd then had the right to withdraw his or her separate trust at ages 25, 27, and 30, with a full right of withdrawal at age 30.

Lloyd's first trust amendment was 11 years later, on May 1, 1995. The first amendment named David as successor trustee, followed by Susan. It also replaced paragraph 2 of article III, to read as follows:

> The trustee shall distribute the remaining trust principal and any undistributed trust income to the Grantor's descendants that survive him, per stirpes.

Lloyd's second and final trust amendment was another 17 years after that, on January 2, 2012, which was executed one week before Lloyd's death. The second amendment provided that "Article III of the Agreement, as amended by the First Amendment, shall remain in full force and effect, subject to the following modifications." First, the new article III provided for the payment of any obligations owed to Marjorie pursuant to the judgment for dissolution of marriage. Second, the new article III provided instructions for the support of Dorothy, including her continued residence in the marital home, the distribution of $100,000 into a separate trust for the costs associated with the home, and the payment of a monthly sum from the trust's income or principal. Finally, the new article III contained the following new paragraphs.

> 3. Notwithstanding any provision of the Trust Agreement or the First Amendment to the contrary, the trustee shall not be obligated to distribute principal, and no child of the Grantor shall have the right to withdraw principal, while any of the foregoing obligations to the Grantor's spouses are outstanding.
>
> 4. Notwithstanding any provision of the Trust Agreement or the First Amendment to the contrary, no child of the Grantor shall have the right to withdraw principal, unless such child is the legitimate, inside of wedlock, parent of a living descendant of the Grantor.

David is an attorney and CPA, who had drafted the second amendment to his father's trust. David testified that he drafted the second amendment during his last visit with the grantor, but that the grantor did not have copies of the original trust agreement or the first amendment, so David worked off the grantor's recollection of the terms. "The grantor received copies of the trust documents only at the end of the second amendment's drafting process, so defendant was able to examine them only briefly." John was the only child of Lloyd who did not have children.

After Lloyd's death on January 9, 2012, his trust had assets valued over $3 million, including a house in Arizona and a house in Michigan. In administering the trust after Lloyd's death, David "sold the marital home referenced in the second amendment and resolved all further claims of Dorothy to the trust's assets." The obligation to Lloyd's ex-spouse, Marjorie, remained outstanding. Between 2012 and 2014, David made unequal distributions of the trust's assets to himself and his siblings and paid himself investment and advisory fees.

Jim and Susan had sought a full distribution of their interests in the trust, and in 2013 Jim suggested that David purchase an annuity to satisfy the interest of Marjorie, so the trust could be distributed. David rejected that idea. After the trust sold the Michigan real estate, Jim hired an attorney to pursue complete resolution of his interest in the trust. David settled with Jim in March 2015, receiving 25% of Lloyd's IRA and 25% of the trust, with adjustments for prior distributions and a reduction for one-fourth of the amount necessary to provide for Marjorie's support obligation. After Jim's settlement, David reached out to Susan, and she reached a similar settlement. Both settlements purported to fully satisfy the trust's obligations to Jim and Susan.

When John hired an attorney, who requested information from David, his first response to the attorney was to provide financial documentation through December 2014, which did not show the settlements to Jim or Susan. After the attorney informed defendant that he was aware of the settlements and asked why plaintiff was not offered a settlement, defendant provided updated financial documentation reflecting the settlement payments, as well as an additional $52,554 in distributions that defendant had made to himself during the first six months of 2015.

John's counsel again wrote to defendant, seeking an explanation of the unequal distributions of the trust assets, noting that the trust required a *per stirpes* distribution. Defendant responded that the trust documents concerted [sic] plaintiff to an "income-only beneficiary" because plaintiff had no children and asserted that the trust documents did not require *per stirpes* distributions but afforded defendant discretion to distribute principal.

After these communications, John filed his complaint seeking a declaratory judgment that the trust documents provided for a *per stirpes* distribution after the satisfaction of the obligations to Marjorie and Dorothy, affording John a 25% share. Count II of John's complaint alleged breach of fiduciary duty by David in making distributions to himself and others in violation of the trust provisions, sought a constructive trust over trust assets improperly distributed, removal of David as trustee, and attorney fees and costs.

David filed a motion for partial summary judgment, which was denied. Notably, however, in his motion, David "claimed that distributions of the trust assets were subject to both the postponement of withdrawal set forth in the second amendment's article III, paragraph 3, and the restriction on withdrawal set forth in article III, paragraph 4. Defendant claimed that, with respect to plaintiff, neither condition had been met—plaintiff had no descendants and Marjorie was still living—so the two clauses operated to restrict plaintiff's access to trust principal." During the first motion for summary judgment, David testified extensively regarding the circumstances surrounding the execution of the second amendment, the intention of the grantor with respect to paragraphs 3 and 4 of Article III, and the relationships of family members. He maintained that he had discretion to make distributions to John and that even if the obligations to Marjorie were satisfied, John could not withdraw principal due to paragraph 4. David acknowledged his believe that he would receive any remaining principal in the trust after John's death.

David filed a second motion for partial summary judgment, and this time John did as well. John argued that the language of the trust unambiguously demonstrated his right to trust principal and David's lack of discretion in making distributions. He also claimed that David had distributed another $500,000 to himself since is first motion was denied.

The trial court granted summary judgment in favor of John on the declaratory judgment, finding that the unambiguous terms of the second amendment did not alter plaintiff's rights to a *per*

stirpes distribution of principal upon the satisfaction of the trust's obligations to Marjorie and Dorothy. The court found that the first amendment provided for an immediate distribution of the trust's principal and income to the grantor's descendants per stirpes upon the grantor's death, and further:

> [w]hile Paragraph 3 of the Second Amendment postponed this obligation by providing that the trustee 'shall not be obligated to distribute principal' (and that no child had the right to 'withdraw' principal) so long as the obligations to Dorothy and Marjorie remained outstanding, Paragraph 4 (which would apply to a child without children) did not address 'distribution' at all, providing instead a restriction on 'withdrawal' akin to that imposed on all children by Paragraph 3.

David filed a notice of appeal and a motion to stay the trial court proceedings, arguing that the court's entry of summary judgment on count I prejudices his defense on Count II. The trial court denied his motion to stay and his appeal was dismissed for lack of jurisdiction.

After the trial on count II, the trial court entered a 48-page memorandum order and opinion, "finding in plaintiff's favor on count II of the complaint." The court found that David breached his fiduciary duty by making any distributions to any of the children while the obligation to Marjorie remained outstanding, and also found that the distributions David made to his siblings were not equal. The court found that after its denial of David's first motion for partial summary judgment, David distributed $291,000 from the trust account and $193,983 from Lloyd's IRA to himself, which he said was to "be on parity" with the distributions he had made to Jim and Susan (even though he took a less-than-proportionate share of the IRA).

The court found that David breached his duty to administer the trust according to its terms and his duty of impartiality. The court also found that David had engaged in self-dealing by continuing to pay himself investment and attorney fees, particularly after rejecting suggestions to purchase an annuity to satisfy the obligation to Marjorie. The trial court removed David as trustee and ordered David to "restore sums wrongfully taken from the trust." The court ordered David to return $483,983 to the trust and distribute the remaining trust property to John once the obligations to Marjorie had been resolved, and to distribute the remaining IRA balance to John, along with $29,466 from David personally for additional tax liabilities.

The trial court also found that David's breach of fiduciary duty as trustee had been willful and constituted acts of self-dealing, and imposed punitive damages, citing the $150,000 paid by John in attorney's fees and costs in prosecuting the lawsuit and awarded him $250,000, that being the attorney's fees plus $100,000 as additional punitive damages.

David appealed, claiming that the trial court erred in interpreting the trust documents and, therefore, improperly granted summary judgment and that its holding after trial was against the manifest weight of the evidence, and additionally, challenged the trial court's assignment of punitive damages.

The appellate court affirmed the trial court's grant of summary judgment and a final holding against David. On the issue of punitive damages, the appellate court was partially sympathetic. The appeals panel rejected David's argument that the trial court erred in finding punitive damages inappropriate, emphasizing that David had demonstrably acted in willful breach of his fiduciary duty.

However, the appellate court acknowledged that the trial court had imposed the $150,000 that John had spent on attorney fees, but then without explanation, imposed an additional $100,000. The appellate court found this additional, unexplained amount was against the manifest weight of the evidence and vacated the $100,000 of the punitive damages. But the appellate court affirmed the trial court's other decisions, including the assessment of $150,000 for attorney's fees and costs.

CLAIMS AGAINST ESTATES

1. ***In re* Estate of Kenneth G. Pigott, 2019 IL App (1st) 181716 (Aug. 16, 2019)**

Obligation of Decedent under Marital Settlement Agreement was mandatory injunction remaining in effect at his death.

Kenneth and Donna Pigott were married in 1963 and divorced in 1982. They had six children and the terms of the marital settlement agreement incorporated into the divorce judgment required both Kenneth and Donna to keep a valid will bequeathing "at least 50% of his net estate to the six children of the parties in equal shares, and their descendants, per stirpes."

The agreement also provided:

> In the event KENNETH or DONNA fails to make a will as provided aforesaid, then the children of the parties, or any of them, shall have a provable, liquidated claim, lien and charge against the estate of KENNETH and DONNA for such amount as a child would have received had such deceased party made a will as hereinabove required.

Kenneth established the Kenneth G. Pigott Trust in 1989, and married Jane DiRenzo Pigott afterward, having one child by her. On Nov. 13, 2014, after being diagnosed with a bone marrow disorder, Kenneth executed a new will and restated the trust. He died on Feb. 13, 2015, and his will was admitted to probate the following April. Oct. 16, 2015 his children from his first marriage filed identical claims, each to one-sixth of 50% of his net estate, asserting they had received less than that amount.

The co-executors of Kenneth's estate moved to dismiss, arguing that petitioners' claims against Kenneth's estate were an attempt to enforce the terms of the marital settlement agreement incorporated into the divorce judgment entered over 35 years ago in 1982; that under Section 12-108(a) of the Code of Civil Procedure the judgment became dormant after seven years; and that under Section 2-1602, the judgment had to be revived within 20 to be enforceable. The circuit court granted the motion to dismiss. The petitioners appealed.

On appeal, the petitioners argued that the section of the marital settlement agreement requiring the decedent to bequeath 50% of his net estate to his children was not a money judgment, and therefore not subject to the revival provisions of Sections 12-108 and 2-1602. Petitioners cited *In re Marriage of Peck*, 2019 IL App (2d) 180598, which held that Section 2-1602 refers to only to money judgments against a judgment debtor.

The appellate court agreed and acknowledged that the precedent did not cover Section 12-108 but emphasized that it "is to be read in pari materia with Section 2-1602, as they each address the subjects of enforcement and revival of judgments." In this case, no money judgment was

ever entered against Kenneth; therefore his obligations under the marital settlement agreement were not subject to the revival provisions of 12-108 and 2-1602.

The appellate court went on to hold that section 10(a) of the marital settlement agreement was a mandatory injunction that remained in effect at Kenneth's death, as he was required to make a will granting the petitioners at least 50% of his net estate. "An injunction remains in full force and effect until it has been vacated or modified by the court which granted it or until the order or decree awarding it has been set aside on appeal. Such a decree or order must be obeyed, even if erroneous, until it is overturned or modified by orderly processes of review." Here, the decedent never appealed the injunctive order or otherwise sought to have the injunction vacated or modified, and therefore it remained valid.

The appellate court, therefore, reversed the circuit court's dismissal and remanded the case for further proceedings.

2. *In re* Estate of Thomas John Heck Jr., 2019 IL App (1st) 182414 (Dec. 6, 2019)

Statute of limitations for demand note is ten years from issuance if no demand is made.

On June 14, 1988, Thomas John Heck Jr. executed a note promising to pay claimant Paul D. Heck the sum of $51,000 at 7% interest, compounded annually. The note contains the following payment terms: "Perpetual 90 day note[.] Borrower shall make a single payment on demand within 90 days of demand letter. If payment is not demanded or paid by borrower[,] this note will renew automatically in full force of the terms until said note is paid."

On November 7, 2016, Thomas John Heck Jr. died. During his life, the decedent never made a payment on the note and the claimant never made a demand for payment. On December 8, 2017, the claimant made a written demand upon the estate for payment of the note. The estate did not pay the note, so claimant filed a claim for $362,886.62, for principal and interest and attorney fees and costs.

The executor filed a motion to dismiss the claim as time-barred. The circuit court found that the note is a demand note and, relying upon the 10-year limitations period contained in section 13-206 of the Code, granted the motion and dismissed the claim

On appeal, claimant maintained that the note renewed in perpetuity and is not subject to a 10-year statute of limitations, and that the circuit court erred when it determined that the note is a demand note. The appellate court cited the statutory definition of a demand note: "A note is a demand note if it states that it is payable on demand, otherwise indicates that it is payable at the will of the holder, or does not state a definite time for payment." 810 ILCS 5/3-108. The court, unpersuaded by the language in the not that it "will renew automatically," found that the note was not payable on a certain date, but was payable "on demand within 90 days of demand letter," and was therefore a demand note.

At the relevant time (before an amendment to 735 ILCS 5/13-206), the applicable statute of limitation provided, "actions on … promissory notes … shall be commenced within 10 years … after the cause of action accrued." Ill. Rev. Stat. 1987, ch. 110, ¶ 13-206. "Generally, a cause of action against the maker of a demand note accrues upon the date of issue." *Theodoskakis v. Austin Bank of Chicago*, 93 Ill. App. 3d 634, 637 (1981). The court concluded, "[a]s the claimant

in this case could have demanded payment on the date of the note's execution and the decedent would have been required to make payment thereon within 90 days thereafter, any cause of action against the decedent based on the note accrued either on execution or, at the very latest, 90 days thereafter."

The claimant did not file his claim until long past the expiration of ten years following the accrual of his cause of action; it was about thirty years. The appellate court upheld dismissal of his claim as time-barred.

3. ***In re* Estates of Kevin and Anita Crawford**, 2019 IL App (1st) 182703 (Dec. 26, 2019)

Hand written log of disbursements could not support claim that funds were loaned to decedents.

Wayne Crawford filed claims against the estates of his son and daughter-in-law, Kevin and Anita Crawford, after the two were killed in an automobile accident. Claimant sought reimbursement of $223,529.59 that he had paid to the decedents over 12 years, claiming that the payments were loans. He alleged that these loans were for groceries, utility bills, and debt payments. Crawford also claimed that he leased a vehicle for Kevin and Anita and paid it off after their deaths.

Crawford produced a 3-page handwritten log of the disbursements, which he claimed was kept contemporaneously as they borrowed, as well as statements from a bank showing checks disbursed to Kevin and Anita from his home equity and checking accounts and release documents for the car. In addition, he produced affidavits from himself and his wife attesting to the fact that the money was intended as a loan and Kevin and Anita intended to repay it.

Anita's father, Erwin Schmidt, was named the executor of their estate. Schmidt filed a motion for summary judgment against Crawford's claim, asserting that the Dead Man's Act prevented Crawford from establishing that he had loaned the money to Kevin and Anita and that any disbursements must be presumed to be gifts as Crawford could not establish that Kevin and Anita understood the money to be loans.

Schmidt moved to strike the affidavits Crawford submitted. The probate court granted the motion to strike, finding the Dead Man's Act barred Crawford's affidavit because "[t]estimony by an adverse party on his own behalf regarding events which took place in the presence of the deceased is inadmissible."

The probate court, having considered that the affidavits which authenticated the log of the loans were stricken from the record, granted summary judgment in favor of Schmidt. Crawford appealed.

In the appeal, Crawford challenged the striking of his affidavits, arguing that they merely testified to the personal knowledge of himself and his wife about Kevin and Anita's intent. The appellate court disagreed, emphasizing that the relevant section of his wife's affidavit was "wholly conclusory" simply asserting "personal knowledge" of their intentions with no support of an explainable basis. The appellate court found that the affidavit did not satisfy the requirements of Illinois Supreme Court Rule 191(a) and so was properly struck.

For his own affidavit, Crawford did not argue that the Deadman's Act did not apply, but claimed that he fell under an exception (Section 8-401), which allows account books that form the basis of a claim and defense to be admitted and authenticated by their owner in an affidavit.

The appellate court disagreed, noting that even if the log of disbursements did fall under that exception, the log does not clearly indicate that the transfers were intended as loans and not gifts. In addition, a "book account" as used in the statute (Section 8-401), is understood by the Illinois Supreme Court to be "the book containing an entry of transactions in the store, factory or office, as they occur in the regular order of business."

The appellate court found that Wayne's handwritten log of disbursements to his son and daughter did not qualify. Accordingly, the appellate court affirmed the circuit court's decision granting summary judgment in favor of the estate.

PERSON CAUSING DEATH

1. *In re* Estate of Marjorie Ivy, 2019 IL App (1st) 181691 (June 26, 2019)

Person charged with murder and found not guilty by reason of insanity not necessarily disinherited under slayer statute.

In *Ivy*, the issue was whether the circuit court erred when it determined that a not guilty by reason of insanity verdict gave rise to an irrebuttable presumption of having intentionally caused death for purposes of section 5/2-6 of the Probate Act. Also known as the Slayer Statute, section 5/2-6 provides, "A person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death . . . A person convicted of first degree murder or second degree murder of the decedent is conclusively presumed to have caused the death intentionally and unjustifiably. . . ."

Defendant was charged with first degree murder for the death of his girlfriend of 32 years and found not guilty by reason of insanity in the criminal trial. Decedent died intestate, leaving defendant as named beneficiary on certain accounts. The independent administrator filed a petition to disqualify defendant under the Slayer Statute.

The plaintiff, independent administrator of the estate, argued that because the defendant was cognizant when the defendant killed the decedent, and that the defendant committed an act that has the natural tendency to destroy another's life, the defendant should be barred from inheriting under the Slayer Statute. The defendant argued that because the defendant believed that the decedent was not the decedent, but rather a demon, the statute should not apply. The defendant further argued that the presumption of intent to kill "presumes that all persons are sane" and the defendant's insanity was adjudicated by the criminal court.

The trial court agreed with the independent administrator, and granted his summary judgment, ruling that defendant was collaterally estopped from relitigating the issue of whether he intentionally and unjustifiably caused Decedent's death.

The appellate court agreed with the defendant and reversed, holding that a verdict of not guilty by reason of insanity did not give rise to an irrebutable presumption of having intentionally caused death. The court reasoned that "the Slayer Statute expressly provides for a conclusive presumption having intentionally and unjustifiably caused death in only two instances – where a

person is (1) convicted of first degree murder or (2) convicted of second degree murder," and that "If the intention of the legislature was to have a [finding of not guilty by reason of insanity] conclusively bar an individual from receiving from the decedent, it has not stated so."

DIVORCE

1. <u>Slesser v. Slesser</u>, 2019 IL App (2d) 180505 (Sept. 10, 2019)

Marital liability is not created when husband could not prove funds from parents' trusts were loans.

In *Slesser*, Husband filed a petition in his divorce trial for a declaration that funds transferred from his parents' trusts created valid and enforceable liens in the amount of $300,000 each against a piece of marital real estate, and that such liens were marital liabilities.

Respondent James and petitioner Donna Slesser were married on September 27, 1980; Donna filed a petition for dissolution of marriage on December 1, 2015. In 2006, respondent's construction company purchased a parcel of land and developed and sold all but one lot (Lot 7). Respondent alleged:

> During the development of the Crosscreek Subdivision, hundreds of thousands of dollars were loaned to JDS by two trusts established by [respondent's] parents, the Revocable Living Trust of James A. Slesser dated December 13, 1991[,] and the Dorothy M. Slesser Trust dated December 13, 1991, … and were used by JDS to make interest and required principal payments on the Hinsdale Bank loan, real estate tax payments on the Crosscreek Subdivision property, and fees and miscellaneous expenses related to the Hinsdale Bank loan.

Respondent further alleged that "the loans from the Slesser Trusts to JDS were memorialized in two separate mortgages for $300,000 each, both of which were recorded against the undivided Crosscreek land parcel on or about February 5, 2010." Later, on July 30, 2015, the Slessers recorded an "Assignment of Mortgage and Assignment of Rents" from Hinsdale Bank to the parents' trusts.

While acting as co-trustee of his father's trust, the trust contained the following provision:

> The trustee shall have the power to withdraw any part or all of the net income and principal of the trust for any benefit. Any net income not withdrawn shall be added to the principal. … In all cases, any acting trustee may sign for my trust, solely and without the signature of the other trustee. Only one signature of an acting trustee is necessary to transfer property or conduct any of the business of my trust….

Respondent's petition sought a declaration that the funds transferred from his parents' trusts created valid and enforceable liens "as marital liabilities subject to equitable allocation between the parties as part of the overall division of the marital estate."

At trial, Wife admitted the property was a marital asset but said that she was unaware of the existence of any liens on the property. Husband could not produce evidence of loan documents, despite the recorded mortgages. The trial court found that under the terms of his

parents' trusts, husband had the power to withdraw income and principal for any purpose, and that he had in fact withdrawn money from the trusts and put the funds into an account under his own name. The evidence did not show that the transactions were actual loans as opposed to funds husband was authorized under the trust documents to withdraw for his own benefit.

The Appellate Court affirmed. Husband provided no evidence to illustrate any obligation to repay his parents' trusts. Without evidence that husband had an obligation to repay the trusts, the mortgage was not a valid encumbrance against the real estate. Therefore, husband was awarded the real estate at a value which did not include $600,000 of debt he alleged was associated with the property.

2. *In re* Estate of Catherine A. Holms, 2019 IL App (2d) 19139 (Dec. 23, 2019)

Broad release in Property Settlement Agreement effectively waived rights as surviving spouse.

Catherine Holms, the decedent, entered a property settlement agreement (PSA) as part of a legal separation from the petitioner, her surviving husband James Holms. No children were born to the children of Catherine and James; Catherine had two children from a prior marriage.

On January 20, 2017, a judgment for legal separation was entered. At that time, the decedent was 61 years old and suffered from a debilitating medical condition. James was 62 years of age and still employed. The judgment incorporated the PSA. The judgment stated that (1) the PSA was "final and non-modifiable," (2) the parties would carry out the terms and conditions of the PSA, and (3) the parties would "establish of record the sole and separate ownership of the property of said parties in the manner therein agreed and provided."

The PSA contained extensive provisions regarding the division of assets between the decedent and James, but did not mention their estates, wills, estate planning, inheritance, or otherwise address rights upon death. The final provision of the PSA included a release of claims, as follows:

> 11.1 Release of Claims. The parties mutually release and forever discharge each other from all actions, suits, debts, claims, and obligations, including claims against each other's property, with regard to any matter that has occurred prior to the date of the execution of this [PSA] with the exception of the following:
>
> A. Any cause of action for dissolution of marriage or legal separation.
>
> B. Enforcement of the provisions of any judgment of dissolution of marriage or legal separation.
>
> C. Enforcement of the provisions of this [PSA].
>
> The parties intend that henceforth there shall exist between them only those rights and obligations specifically provided for in this [PSA] or in any judgment for dissolution of marriage or legal separation.

> The parties agree that neither party will at any time sue the other party, or his or her heirs, representatives, or assigns to enforce any right relinquished under this [PSA].
>
> 11.2 Other Parties Bound. This [PSA] binds not only the parties, but also their heirs, executors, administrators, legal representatives, and assigns. In addition, this [PSA] shall inure to the benefit of the parties' heirs, executors, administrators, legal representatives, and assigns.

Upon decedent's death, without a will, James filed a petition for probate of her estate and an affidavit of heirship listing himself as a spouse and heir. The respondent, Tracy Batdorf, the decedent's daughter, filed a counterpetition arguing that, pursuant to the PSA, James was not an heir of the decedent's estate. On the counterpetitions, the probate court appointed an independent party as admintrator.

James filed a response to Tracy's petition for supervised administration, arguing that it was not possible for any separation agreement to remove the legal rights of heirship and that, even if it were possible, it would require very specific and explicit language to that effect. He noted that the PSA did not contain a single provision specifically addressing rights of heirship. The trial court found that there were no words in the PSA that referenced the possibility of death or that clearly indicated the intent to surrender or waive a statutory spousal award. Thus, it determined that James was a spouse and heir of the decedent and was not barred from asserting any rights he might have as a surviving spouse, and Tracy appealed.

The appellate court reversed, viewing the case as one of interpretation of the property settlement agreement. "The ordinary rules for the construction of contracts apply to the interpretation of a marital settlement agreement. A judgment of dissolution and a marital settlement agreement are to be construed as a single agreement. Id. In the present case, there is no reason why the same principle would not apply to a judgment for legal separation and a PSA."

The appellate court found the language of the judgment for legal separation and incorporated PSA susceptible to only one reasonable interpretation: that the parties intended to waive all interest in each other's property, including any spousal inheritance rights. The decedent and James specifically agreed that they were mutually releasing each other from any claims, "including claims against each other's property." The appellate court held that "the trial court erred in finding that James was an heir of the decedent's estate," and remanded the case accordingly.

REAL ESTATE

1. <u>Parks v. Parks</u>, 2019 IL App (3d) 170845 (June 12, 2019)

Laches bars claim to real estate fifty years after contract and intervening probate proceeding.

William Parks, Sr. and his wife, Laura Parks, owned 332 acres of land in Rock Island as joint tenants, by deeds recorded in 1943. They had five children. One of them, Will Jr., moved onto the farm in 1947 with his wife and farmed the land. He lived there until he died in 2002. In 1960, Will Sr. and Laura moved to Aledo, Illinois, and Laura wrote letters to her other children

informing them that she and Will Sr. intended to sell Parks Farm to Will Jr., detailing the proposed transaction.

In conformity with the letter, Will Sr., Laura, Will Jr., and Will Jr.'s wife signed a purchase and sale agreement and Will Jr. and his wife signed a mortgage on the farm. The purchase price of the farm was reduced by Will Jr.'s anticipated inheritance. On the last page of the agreement, there were handwritten notes apparently showing interest payments made from 1962 to 1977. There was no notation for the year of 1972 nor for any year after 1977. No deed conveying Parks Farm from Will Sr. and Laura to Will Jr. was ever recorded. The record contains no document from Laura or Will Sr. advising their other children that Will Jr. had either completed or defaulted on the purchase of which she had previously advised them. Nor was there any allegation that such information had ever been conveyed to them.

Will Sr. died in 1985 and Laura died in 1989. Laura's will made no mention of the farm as part of her estate, but did divide her estate among her other children, excluding Will Jr. Laura's granddaughter became the executor of her estate, filed an inventory, and ultimately filed a final account and report and plan of distribution. Notice of the final account was given to Laura's children and to the children of a deceased child, and Laura's estate was closed. No interest in the farm, nor a still pending purchase agreement, was included as a part of Laura's probate estate proceeding.

In 1993, Will Jr. created his own revocable trust, in which gave all farm real estate "which [he] currently ow[ed]" to his grandnephew, James D. Parks, subject to two conditions creating an interest in the farm for life for Will Jr.'s son. Will Jr. conveyed "all right, title, and interest" in the farm to the trust by quitclaim deed. Will Jr. continued to live on and cultivate the farm, and the real estate tax bills were mailed to and paid by him. After Will Jr.'s death in 2002, in January 2005, the trustee of the trust conveyed the fam to James D. Parks, and that deed was recorded. James D. paid the tax bills until 2011.

A grandchild of Laura, Charles – Will Jr.'s nephew and James D.'s uncle – "received a letter from his attorneys that prompted him to inquire about his possible ownership interest in [the farm]." Charles discovered that no quitclaim deed from Will Jr. to Will Jr.'s trust had been recorded. Presumably, Charles also discovered that no deed from Will Sr. and Laura, or Laura, to Will Jr. had ever been recorded.

In January 2012, Charles and his brother, along with some cousins, filed a complaint claiming title to the farm under Laura's will and seeking recovery of all sums and benefits accruing to James D. and to Will Jr.'s trust. They amended the complaint to add a claim for ejectment, arguing that they were entitled to possession of the farm under Laura's will. Defendants responded, claiming four affirmative defenses: (1) 20-year adverse possession, (2) 7-year adverse possession with payment of taxes, (3) estoppel, and (4) *laches*.

On cross-motions for summary judgment, the court found for defendants, ruling that James D. had possessory rights to the land. The court further found that plaintiffs' claim was barred by *laches*.

The appellate court affirmed the trial court, holding that the defendants had proved the affirmative defense of *laches*. "To prove *laches*, defendants must show (1) lack of diligence by the party asserting the claim and (2) prejudice to the opposing party resulting from the delay." "The test is not what the appellant knows, but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him."

First, the court concluded that the plaintiff's did not diligently assert their claim, finding that plaintiffs "knew or should have known about their interest in the farm decades before [the] action was filed." Will Jr.'s siblings knew of the purchase agreement in 1960. The executor of Laura's estate undertook no inquiry and did not include the farm or anything related to it in the inventory or the final report and plan of distribution. The court found that the plaintiffs should have known to inquire during Laura's probate proceeding about the status of any interest they might still have in the farm, and this action was filed 23 years after Laura's death. Instead, the signed receipts on distribution stating that each had received 100% of his or her share of the estate.

Second, the court easily agreed with the trial court that defendant was demonstrably prejudiced by the delay of 29 years between the execution of the contract and Laura's death, and the 23 years between Laura's death and the filing of this complaint because (a) Laura, Will Jr., and James C. (and Will Sr.), all now deceased, could have testified to pertinent information about the contract and farm, (b) several years after Will Jr.'s death, his attorney had destroyed his files, (c) James D. would have no reason to save cancelled checks and receipts as the farm was not listed as part of the inventory in Laura's probate, and (d) plaintiffs had waited until after the 20-year limitations period to file their claim.

"Where the period of limitation is fixed by statute, it is not barred by *laches* unless, in addition to mere delay, there would be something in [plaintiff's] conduct or the circumstances that would make it inequitable to permit her to assert her title." Here, the court found that the plaintiffs should have know about any claim they had to the farm, at the latest, during Laura's probate proceeding. Section 13-101 of the Code of Civil Procedure provides a 20-year limitation period to commence an action for the recovery of lands. Because the complaint was filed beyond that period, it could also be barred by *laches*. However, the court made clear, that even if this claim had not been barred by the 20-year limitation period, it would nevertheless be barred by *laches*.

2. <u>Alward v. Jacob Holding of Ontario L.L.C.</u>, 2019 IL App (5th) 180332

Beneficiary of land trust cannot convey title; subsequent mortgage removed as cloud on title.

In *Alward*, plaintiff Phillip Alward brought an action to quite title regarding property that was the subject of a previous quitclaim deed by him, individually, when the property was held in a land trust. In 2012, Phillip had purportedly conveyed title to his son and daughter-in-law, Grant and Carrie Alward, by a quitclaim deed that was recorded. The property was subject to a mortgage held by Chase, which the Alwards assumed. The Alwards subsequently obtained another loan from Jacob Holding, secured by a recorded mortgage.

Grant tried to sell the residence in 2015, but that sale ultimately fell through. During the sale process, Phillip was in contact with the title company who was going to close the sale, Chase Bank, and Chicago Title, the trustee of the land trust. Phillip's legal counsel summarized the following issues via e-mail:

> [Phillip] intended to convey a residence to his son Grant in April 2012 with the understanding that Grant would take over the mortgage loan. However, [Phillip] forgot that title was in a land trust ([Chicago Title] is now Trustee). Grant has recently signed a contract to sell the residence to an unrelated third party with a

closing scheduled for June 10, 2015. [Chase Bank's] loan will be repaid in full from closing proceeds.

After the sale house fell through, the Alwards entered into a loan agreement, secured by a mortgage held by Jacob Holding, without plaintiff's knowledge. While the record is unclear whether the Alwards had knowledge of the land trust at that time, it is undisputed that, prior to entering into the agreement, the Alwards did not secure a trustee's deed or inform Jacob Holding of the land trust. Shortly thereafter, Jacob Holding recorded the mortgage

Plaintiff directed the trustee of the land trust to convey the property to him and terminate the land trust. He then filed an action to quiet title, seeking to have the mortgage of Jacob Holding removed as a cloud on title. Phillip alleged that, because Chicago Title and Land Trust Company, as successor trustee, had sole authority to convey title, the quitclaim deed to the Alwards was invalid and the title transfer was ineffective.

Phillip and Jacob Holding filed cross-motions for summary judgment. Jacob Holding argued that Illinois case law permitted a beneficiary to convey property rights even if the property was held in a land trust; thus, the quitclaim deed assigned plaintiff's beneficiary interests to the Alwards. Alternatively, Jacob Holding asserted that it was protected from adverse claims as a "bona fide purchaser for value" because it had no notice of defect in the title. The trial court denied Phillip's motion and granted summary judgment for Jacob Holding, reasoning that "it would be unjust to allow plaintiff "'to subsequently take back this transfer on which subsequent parties have relied" because plaintiff had the ability to direct the transfer of the land trust and "fully intended to do so.'"

The appellate court reversed, reasoning that legal and equitable title lie with the trustee of a land trust, and the beneficiary retains what is referred to as personal property. "[O]nly the trustee may deal with the property." The court cited the First District case, *In re Estate of Crooks*, 266 Ill. App. 3d at 721, which held that a beneficiary of a land trust could not convey title to real property by executing a quitclaim deed.

Jacob Holding cited several cases for the proposition that a land trust beneficiary may contract for the sale of the land, and a purchaser may obtain title from the land trust even if the purchaser was unaware of the land trust at the time of the contract. The court generally agreed, in that the seller in that case can direct the trustee to convey the property. The question here, however, is the validity of the deed from Phillip to the Alwards. Phillip did not contract with Jacob Holding and the Alwards are not parties.

Finally, the court noted, that the Alwards and Jacob Hodling each had constructive notice that the property was held in a land trust from the public records, which would have revealed that the deed to the land trust was recorded in 1996. The court found that the quitclaim deed and the mortgage created a cloud on title and remanded for entry of summary judgment in favor of plaintiff.

3. <u>Jezewski v. Jaworski</u>, 2019 IL App (1st) 170100 (Sept. 30, 2019)

Deed could not create joint tenancy where there was no unity of interests.

In *Jezewski*, a deed conveyed property in Chicago as follows:

> An undivided one half interest to Aniela Jezewski and an additional undivided one half interest to Kazmierz Jaworski and Elizabeth Jaworski as Joint Tenants and not tenants in common.

Aniela died in 2009 and a probate estate was opened. Aniela and defendants, her daughter and son-in-law, had purchased a property and received the deed quoted above. Her estate filed a petition to partition the property. Kazmierz filed a motion to dismiss the petition, arguing that the estate had no interest in the property, and therefore no standing to bring a partition action, because the deed created a joint tenancy among all of the grantees. He claimed, therefore, that upon Aniela's death, her interest passed directly to him and Elizabeth.

The Court held that the language in the deed was not ambiguous and clearly did not create a joint tenancy among Aniela, Kazmierz, and Elizabeth. One requirement to create a joint tenancy is that each person must receive an equal share of the property—they must have a unity of interests. In this case, Aniela originally received a one-half share and Kazmierz and Elizabeth each received a one-quarter share as joint tenants. The three individuals did not have equal shares and, therefore, could not have been joint tenants. Rather, they owned the property as a whole as tenants in common, with Kazmierz and Elizabeth owning half as joint tenants. Aniela's one-half share did not pass directly to Kazmierz and Elizabeth but remained in her estate, which was entitled to file a petition for partition.

USE TAX

1. <u>Shakman v. Dept. of Revenue</u>, 2019 IL App (1st) 182197 (Dec. 12, 2019)

Illinois Aircraft Use Tax applies to transfer from owner to owner's revocable trust.

In *Shakman*, the 1st District Appellate Court rejected a lawyer's challenge to a tax bill he received when he reregistered the title of his sailplane to his revocable trust. The court ruled that the state's aircraft use tax applied to the transfer made by attorney Michael Shakman, despite the fact he paid the tax when he first acquired the sailplane.

Shakman paid a use tax of $7,370 based on the purchase price of the Schleicher glider he bought in 2008. But when he sought to change ownership from himself individually to himself as trustee in 2014, the state Revenue Department billed him under the Illinois Aircraft Use Tax Act, which mandates a 6.25% charge "on the privilege of using" such a craft "acquired by gift, transfer or purchase."

He paid $7,511.63 under protest, arguing he never altered or lost the privilege of operating the plane he acquired in the first place. But the panel noted the aircraft tax law incorporated definitions from the Use Tax Act, which contemplates the use of property by both individuals and trustees and defines "transfers" broadly.

The court wrote that it was "clear that the legislative intent was to cover an expansive and nearly limitless array of aircraft dispositions," and as such, concluded the law aimed to tax Shakman's transfer.

"In other words, Shakman both individually and as trustee of his revocable trust enjoyed the privilege to exercise a right over his aircraft incidental to ownership of that aircraft. As a natural individual, Shakman enjoyed that right unfettered, and as trustee, he enjoyed that right

consistent with the language of his revocable trust," the court wrote. "And although Shakman is ultimately the same person as a natural individual and trustee, the privileges of use are different by virtue of him being a trustee."

Shakman created the trust in 1990 and restated it in 2007, naming him settlor, trustee, and beneficiary during his lifetime. It also gave him the power to revoke or amend at any time. Upon death, the property would pass to a marital trust for his wife and a bypass trust for his children.

During estate planning in 2014, he completed a bill of sale for the aircraft changing ownership from himself to his trust and filed it with the Federal Aviation Administration. The state Revenue Department monitors FAA records, noticed the change and sent Shakman a bill for $7,511.01 for the tax, penalty and interest.

He actually paid $7,511.63, believing the department calculated the interest incorrectly, and in March 2018, filed a two-count complaint, arguing for an injunction preventing the state from transferring the money into its coffers and making the case the tax was wrongly imposed.

The Cook County Circuit Court granted the preliminary injunction, preventing the money's transfer, but ultimately granted summary judgment for the state.

On appeal, the court wrote that the 6.25% aircraft tax can be boiled down in this case to cover "the privilege of using … any aircraft … acquired by … transfer."

Section 35 dictates the same definitions utilized in the Use Tax Act apply to the aircraft tax. Reconstructing the above phrase with those definitions — as well as the Black's Law Dictionary definition of "transfer" — mandates a 6.25% tax on the privilege of "the exercise by any natural individual or trustee of any right or power over an aircraft incident to the ownership of the aircraft and where that right or power was obtained by any mode of disposing of or parting with property or an interest in the property."

From that, it's clear the law should apply broadly, the court ruled.

Shakman argued the decision to tax his move elevated form over substance and the panel should weigh the fact that he could still make changes and control his trust as proof there wasn't actually any change in ownership that could be taxed. The court took the point — that gifts to trusts aren't final until the settlor relinquishes control over the property at stake. The principles of gifting are the same under Illinois common law, the panel noted. But this case deals with a specific Illinois tax and that tax isn't limited to "gifts," but also includes "transfers."

The panel affirmed the circuit court decision, but wrote:

> While we have reached this conclusion, we are not unsympathetic to Shakman's cause. The Department imposed against him a nearly $8000 tax (inclusive of a penalty and interest) for routine estate planning. And certainly, if Shakman decided to remove the plane from his revocable trust, he could very well incur a third tax on his airplane.

The tribunal noted other state legislatures, such as California and Virginia, have written laws to exempt aircraft owners from taxes when they are in the same situation as Shakman. "Should our legislature believe that no aircraft use tax should apply in circumstances such as

Shakman's, it may follow the lead of Virginia and California and expressly exempt such transfers," the court concluded.

ATTORNEYS

1. McCarthy v. Abraham Lincoln Reynolds, III, 2006 Declaration of Living Trust, 2019 IL 123622 (June 20, 2019)

Attorney appearing *pro se IS* entitled to attorney fees as part of sanctions.

In the 2018 materials for this program, we discussed the First District Appellate court opinion in *McCarthy v. Abraham Lincoln Reynolds, III, 2006 Declaration of Living Trust*, 2018 IL App (1st) 162478 (March 30, 2018). The appellate court had reversed the circuit court, holding that an attorney defending himself *pro se* was not entitled to recover attorney fees as a sanction under Rule 137. That appellate court decision has now been reversed by the Illinois Supreme Court. The summary of the appellate court decision from the 2018 materials, with the background facts and procedure, is copied here:

> Plaintiff, Gerald McCarthy, was the beneficiary of a living trust. After the trustee died, defendant Marvin Gray was appointed as the "attorney of that trust." Plaintiff filed a complaint against Gray for breach of fiduciary duty and tortious interference with plaintiff's beneficial interest in the trust.
>
> Plaintiff had previously filed a complaint in 2013 alleging that an amendment to the trust was invalid. Gray was a witness in that trial. The circuit court ruled against McCarthy in that case, and the appellate court affirmed that ruling in a prior opinion.
>
> Thereafter, in 2014 plaintiff filed a five-count complaint against defendants Rozlyn Talyor, individually and as trustee, and Gray. The two counts against Gray alleged that (1) Gray breached his fiduciary duty to plaintiff as a beneficiary of the Trust, and (2) Gray tortiously interfered with plaintiff's share of the trust by making false statements and presenting misleading evidence against him in the 2013 case.
>
> The circuit court dismissed McCarthy's second complaint pursuant to 735 ILCS 5/2-619(a)(4) based on the doctrine of *res judicata*, where the cause of action essentially asked the circuit court to relitigate the issues determined in the 2013 case, namely, the veracity of the Trust amendment. The circuit court also dismissed the breach of fiduciary duty claim against Gray on the basis that the attorney for the trust did not owe a fiduciary duty to the trust's beneficiaries as a matter of law, and McCarthy had not alleged any facts which would establish that Gray owed him a fiduciary duty. Note that the court wrote that McCarthy could have alleged facts "to support that any contract was entered into for his benefit, or the benefit of all the beneficiaries."
>
> Gray filed a motion seeking sanctions under Rule 137, including attorney fees. Gray alleged that plaintiff made false statements in his complaint and that he and plaintiff did not have an attorney-client relationship. Gray requested sanctions in the amount of $11,232.55 as a result of having to defend against "plaintiff's unfounded, fallacious and specious allegations and pleadings." Gray later amended his sanction request to $12,106.03 for further time expended.

The trial court found that McCarthy's cause of action for tortious interference was frivolous and granted sanctions on that basis, but concluded that sanctions were not appropriate for the breach of fiduciary duty claim. The trial court determined that, "although Gray proceeded *pro se*, 'the language of Rule 137 supports the notion that sanctions are available because the supreme court made it clear that a sanction may (but does not necessarily have to) include attorney fees.'" Accordingly, the trial court award sanctions to Gray for his defense against a frivolous claim in the amount of $9707.98, including $102.28 in costs.

The appellate court upheld the dismissal of McCarthy's 2014 complaint. The appellate court also held that the trial court did not abuse its discretion in imposing Rule 137 sanctions. However, the appellate court agreed with the plaintiff's argument that the circuit court abused its discretion in awarding excessive fees against him to an attorney that proceeded *pro se*. While the decision to impose sanctions pursuant to Rule 137 is subject to review for an abuse of discretion, "whether the circuit court has the authority to grant attorney fees as an available remedy is a question of law that we review *de novo*."

The appellate court cited the Illinois Supreme Court case *Hamer v. Lentz*, 132 Ill. 2d 49 (1989), where the court held that an attorney appearing *pro se* in an action brought pursuant to the Freedom of Information Act (FOIA) was not entitled to attorney fees. "The supreme court reasoned that fees were not appropriate under those circumstances because the fee-shifting provision of the FOIA was designed (1) to remove the burden of legal fees as a deterrent from litigants, which was not a barrier for a *pro se* attorney because a lawyer representing himself does not incur legal fees, (2) to reduce unnecessary litigation by encouraging citizens, even lawyers, to seek objective legal advice before filing suit, and (3) to avoid abusive fee generation by unscrupulous attorneys." The court noted that subsequent appellate opinions expanded the rule to other contexts, such as defending against a malpractice action and in divorce proceedings.

The court wrote that, "[t]he parties have not cited, and our research has not uncovered, any case law applying the Hamer rule to a Rule 137 motion." Further, "Rule 137 … is silent on the recovery of attorney fees for all *pro se* litigants, whether an attorney or not."

The appellate court held that an attorney representing himself *pro se* is not entitled to attorney fees as part of a sanction under Rule 137. The court reasoned, based on the line of cases under *Hamer*, "without any support establishing that attorney fees are appropriate under the circumstances before us, we choose to follow the demonstrated law providing that *pro se* attorneys are not entitled to attorney fees, especially because Rule 137 is penal in nature and must be strictly construed." According to the court, "courts consistently have considered the fact that *pro se* attorneys are not burdened by legal fees, such that the fees created a barrier to seeking representation."

The court cited another FOIA case, *Brazas v. Ramsey*, 291 Ill. App. 3d 104, 110 (2nd Dist. 1997), in which that court reasoned that there was "no appreciable difference between a lawyer and a nonlawyer representing himself in a *pro se* complaint" as, "in either case, neither litigant incurs any legal fees in the prosecution of his action." Thus, "courts have highlighted that nonattorney *pro se* litigants are not entitled to

> fees for the time they spend litigating their own cases; therefore, *pro se* attorneys should not be treated differently."

In what it called a case of first impression, the Illinois Supreme Court disagreed and reversed the appellate court, holding that, under Rule 137, a court is authorized to impose sanctions in the form of attorney fees against a plaintiff to compensate an attorney defending himself against a frivolous cause of action. Finding the issue to be one of interpretation of a Supreme Court Rule, the Supreme Court reviewed the case *de novo*. The portion of Rule 137 at issue was the following:

> If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee.

The court wrote that it is settled that "[t]he purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions." In other words, the clear purposes of Rule 137 is to prevent the filing of false and frivolous lawsuits. According to the court, "[n]othing in the plain language of Rule 137(a) precludes imposition of a sanction for filing of a frivolous lawsuit in the form of an award of fees in favor of a pro se defendant who is also an attorney."

The court noted the appellate court's reliance on its opinion in *Hamer v. Lentz*, 132 Ill. 2d 49 (1989), and other cases involved statutory fee-shifting provisions, The purpose of the FOIA fee-shifting provision "is to ensure its enforcement, and that 'is accomplished by removing the burden of legal fees, which might deter litigants from pursuing legitimate FOIA actions.'" (citing *Hamer*). Moreover, the court explained in *Hamer* that the FOIA fee-shifting provision was not "intended as either a reward for successful plaintiffs or as a punishment against the government" and that "legal fees do not present a barrier to a pro se lawyer seeking to obtain information."

The Supreme Court distinguished *Hamer* and its progeny because those cases involved statutory fee-shifting provisions, not sanctions under Rule 137. "The policy considerations underlying our decisions in *Hamer* and [*State ex rel Schad, Diamond & Shedden, P.C. v. My Pillos, Inc.*, 2018 IL 122487] are not present when a court awards sanctions under Rule 137." Rule 137 sanctions "sanctions are intended as a punishment against the party who abuses the judicial process, not as a reward to a successful *pro se* attorney who is defending against a frivolous lawsuit." Thus, the concern in the statutory fee-shifting cases about "deterring abusive fee generation by lawyers who initiate litigation is not present when sanctions are imposed *against a plaintiff* who files frivolous pleadings."

Importantly, in this case, both the circuit court and the appellate court had found that plaintiff's underlying case "was undoubtedly a frivolous cause of action." The defendant did not initiate or otherwise invite the frivolous pleadings, but was forced to defend against the frivolous claims filed by plaintiff (also an attorney). The court reasoned that "the essential underlying policy of Rule 137 of discouraging frivolous or harassing litigation is furthered by imposing sanctions in the form of an award of attorney fees in favor of a *pro se* attorney defending against meritless claims." "If the policy of Rule 137 sanctions is to deter frivolous pleading and litigation, it would be illogical to deny attorney fees to pro se attorneys defending themselves in such matters."

Such a holding, according to the court, would “clearly frustrate the purpose of Rule 137 and unfairly reward those who persist in maintaining frivolous litigation.”

Justice Garman dissented. In her view, “the majority attributes little value to the fact that, for over 150 years, *pro se* attorneys have not been permitted to obtain attorney fees for their own work.” Where no attorney-client relationship exists, no attorney fees have been incurred. (citing *Hamer* (“A lawyer representing himself or herself simply does not incur legal fees.”). If the drafters of Rule 137 intended the term “attorney fees” as used in the Rule to include those of a *pro se* defendant-attorney, they would have made such an understanding explicit. Essentially, Justice Garman wrote, “given that a *pro se* attorney does not incur legal fees, the majority is essentially awarding ‘attorney fees’ to defendant to ‘compensate’ him, not for the fees he incurred to obtain legal representation, but for the opportunity costs he chose to forgo.”

Justice Karmeier also dissented. He “agree[d] with Justice Garman's analysis insofar as she concludes that an award of ‘attorney fees’ is inappropriate in this circumstance because there is no attorney-client relationship and thus no “attorney fees” have been incurred.” He also agreed with Justice Garman’s “assessment of what the majority is actually trying to accomplish: ‘[G]iven that a *pro se* attorney does not incur legal fees, the majority is essentially awarding ‘attorney fees’ to defendant to ‘compensate’ him, not for the fees he incurred to obtain legal representation, but for the opportunity costs he chose to forgo.’” However, Justice Karmeier disagreed with leaving a *pro se* defendant-attorney to bear the brunt of a plaintiff’s abusive litigation, an outcome which to him seemed “inconsistent with the purpose and language of the rule; that is the result the majority is straining to avoid. ‘The purpose of Rule 137 is to prevent abuse of the judicial process by penalizing claimants who bring vexatious and harassing actions.’” Justice Karmeier viewed the Rule as allowing the circuit court to impose an “appropriate sanction,” which is used broadly and “may include” defendant’s “reasonable expenses incurred” and “attorney fees.” Thus, while the defendant here should not be entitled to “attorney fees” as a sanction, defendant may be entitled to an “appropriate sanction,” which could include the loss of income attributable to the time he spent away from his practice defending against the frivolous lawsuit. Justice Karmeier would have remanded the case to the appellate court and directed the appellate court to remand the case to the circuit court for a redetermination of “appropriate sanctions.”

2. <u>Nichols v. Fahrenkamp</u>, 2019 IL 123990 (June 20, 2019)

GAL *IS* entitled to quasi-judicial immunity from negligence suit by ward.

This is the second case under this section in which the Illinois Supreme Court has reversed a decision of the appellate court that was previously discussed in these materials. In last year’s materials for this program, we discussed the Fifth District Appellate court opinion in *Nichols v. Fahernkamp*, 2018 IL App (5th) 160316 (July 9, 2018). The appellate court had reversed the circuit court, holding that a guardian *ad litem* in probate proceedings is not entitled to quasi-judicial immunity. That appellate court decision has now been reversed by the Illinois Supreme Court. The summary of the appellate court decision from the 2019 materials, with the background facts and procedure, is copied here:

> <u>Nichols</u> involved a personal injury settlement for a plaintiff when she was a minor. The plaintiff’s mother was appointed as the guardian of her person and her estate, and the court was required to approve any disbursements of the settlement fund until the plaintiff turned eighteen. The court also appointed a guardian *ad litem*. Over the

next few years, the mother made requests for disbursements to pay for expenses related to the minor, the guardian *ad litem* recommended approval of several of these requests, and the probate court approved the disbursements.

After she turned eighteen, the plaintiff claimed that her mother dissipated the settlement funds, essentially by lying in the disbursement requests about what the money would be used for or how much was needed. The plaintiff sued her mother, but did not recover everything she thought she should, largely because the court would not reexamine or go behind the probate court orders approving each disbursement. Plaintiff did not appeal that decision but sued the guardian *ad litem* for negligence.

The guardian *ad litem* moved for summary judgment, arguing he was subject to quasi-judicial immunity as an agent of the court. Appellate courts for the First and Second District have each held that a "child representative" in divorce or custody proceedings (who performs more functions than a guardian *ad litem* in such proceedings) is entitled to quasi-judicial immunity. The trial court followed these and other decisions to find that the immunity applied. The plaintiff appealed.

On appeal, a divided panel of the appellate court reversed, finding guardians *ad litem* may have immunity in divorce or custody proceedings, but not in probate proceedings. The Appellate Court held that the guardian *ad litem* "owed a duty to plaintiff to render advice and to protect plaintiff's assets and interests arising out of the underlying personal injury settlement." This meant that the guardian *ad litem* "had a duty to act as an advocate on behalf of plaintiff." In light of this duty, summary judgment was inappropriate because a question of fact remained as to whether the guardian *ad litem* "fulfill[ed] his role as plaintiff's advisor, advocate, negotiator, or evaluator."

The Appellate Court distinguished a probate guardian *ad litem* from guardians *ad litem* in dissolution of marriage and child custody proceedings, writing that the guardian *ad litem* in this case "was not simply a neutral party…. [He] was a licensed attorney, an officer of the court, who should have understood the need to protect the assets of his ward," and he had a duty "independent of merely acting as an arm of the court." Further, relying on *Vlastelica v. Brend*, 2011 IL App (1st) 102587, the appellate court explained that the only rationale for immunity in divorce and child custody proceedings was to allow guardians *ad litem* to fulfill their obligations without worry of harassment or intimidation from dissatisfied parents—and this rationale did not apply in this case.

A dissenting opinion argued that the majority's determination that the guardian *ad litem* was not entitled to qualified or absolute immunity "runs contrary both to sound authority and is impractical in practice in our trial courts." The dissent believed the majority's decision would have adverse consequences to the effective administration of justice, such as requiring trial judges "to provide specificity in directions to the guardian *ad litem*, which may or may not be effective, may or may not cover the factual situation at issue, and may very likely be premature in the development of the litigation in which the guardian *ad litem* is acting, since the guardian *ad litem*'s appointment would likely be early in the litigation and prior to development of facts and issues;" and imposing upon the guardian *ad litem* "duties and requirements, not well defined," increasing the likelihood "that future guardians *ad litem* be blindsided

> by duties not specific or implied in the trial judge's appointment and subsequent orders," and deterring attorneys from accepting appointments to be guardians *ad litem*.
>
> Following the appellate court's decision here, the guardian *ad litem* petitioned the Illinois Supreme Court to hear the case, which agreed to do so. Oral argument was heard on March 13, 2019.

The Illinois Supreme Court reversed the Fifth District Appellate Court, and held that a guardian *ad litem* has quasi-judicial immunity from tort liability for his conduct within the scope of his appointment. In doing so, the court affirmed the entry of summary judgment in favor of the GAL by the circuit court.

The Supreme Court noted that the appellate court rejected Fahrenkamp's reliance on *Vlastelica v. Brend*, 2011 IL App (1st) 102587 and other cases that held that child representatives have immunity in the context of divorce and custody matters. Rather, based on *Stunz v. Stunz*, 131 Ill. 210 (1890), the appellate court concluded that guardians *ad litem* have a duty to protect their wards' assets and interests. "The [appellate] court determined that defendant Fahrenkamp had 'a duty to act as an advocate on behalf of plaintiff,'" and that "immunizing guardians *ad litem* from tort suits would be inconsistent with this duty."

The Supreme Court agreed with the dissenting opinion of Justice Goldenhersch, which agreed with Fahrenkamp that "guardians *ad litem* do not serve as advocates for their wards but act as agents of the court." Thus, because they are "arms of the court," the dissent would have found that guardians *ad litem* are entitled to quasi-judicial immunity.

The Supreme Court began by discussing the background of quasi-judicial immunity, which "originates in the common-law principle that judges are immune from liability for the acts they perform as part of their judicial duties." This common law immunity extends beyond the judges themselves to protect other actors in the judicial process. The court cited the U.S. Supreme Court case *Cleavinger v. Saxner*, 474 U.S. 193 (1985), which applied the "functional test" to determine whether an actor's role is sufficiently connected to the judicial process to merit immunity. That test considers

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

According to the court, the "functional test" requires the court to "look past the title attached to an office or position and look to that position holder's role." In other words, Fahrenkamp neither received nor forfeited immunity simply by acquiring the title "guardian *ad litem*." Of course, the parties did not agree on the role of the guardian *ad litem* in this case. The court's order appointing Fahrenkamp stated only that the court "does hereby appoint David Fahrenkamp as Guadian Ad Litem for the minor child, Alexis Brueggeman."

Fahrenkamp characterized the guardian *ad litem*'s function based on the statutory definition in the Illinois Marriage and Dissolution of Marriage Act, which also has separate definitions of a child's "attorney" and a "child representative." Under these definitions, the court found, the

guardian *ad litem* is the most associated with the judicial process. “The guardian ad litem provides the court with a report on the child's best interests. That report is available to all parties, and the guardian ad litem may testify as a witness. These responsibilities clearly indicate that a guardian ad litem under the Marriage Act is not an “advocate” in the manner of either the child's attorney or a child representative.”

In addition, the court noted that it has previously held in *In re Mark W.*, 228 Ill. 2d 365 (2008), that “a circuit court had the inherent authority to appoint a guardian ad litem to report on the best interests of a mentally disabled parent.” *In re Mark W.* described the guardian ad litem's role as the “‘eyes and ears of the court’ and not as the ward's attorney.”

Nichols argued that the case from which the instant lawsuit stems involved the distribution of a minor’s assts, and therefore Fahrenkamp was appointed as GAL under article XI of the Probate Act. Section 11-10.1(b) of the Probate Act provides that “[i]n any proceeding for the appointment of a standby guardian or a guardian the court may appoint a guardian ad litem to represent the minor in the proceeding.” Additionally, section 27-3 states that a “guardian ad litem appointed under this Act shall file an answer, appear and defend on behalf of the ward or person not in being whom he represents.” Nichols argued, therefore, that Fahrenkamp’s role as guardian *ad litem* was to serve as her “advocate.” Nichols also relied on *Stunz*, a case in which the guardian *ad litem* “failed to fulfill his obligation to mount a legal defense of the ward’s interests.”

The court acknowledged that “at the time of *Stunz* (1890), this court first described the guardian *ad litem*’s duty to raise a legal defense of the ward’s interest.” Further, “[w]hen he General Assembly enacted the Probate Act and passed section 11-10.1 of the Probate Act in 1979, it had a similar view of guardians *ad litem*.” “In early cases under the Probate Act of 1975, guardians *ad litem* acted much like traditional attorneys.” While the legislator has not amended the provisions in the Probate Act regarding guardians *ad litem*, the General Assembly did amend the Marriage and Dissolution of Marriage act and established the “tripartite division between attorneys, child representatives, and guardians *ad litem*.” Further, although article XI of the probate act has not been updated, article Xia (regarding disabled adults) was amended in 1995 to provide, at 755 ILCS 5/11a-10(a), that a court may appoint a guardian *ad litem* “to report to the court concerning the respondent’s best interests consistent with the provisions of this Section.”

The court went on to explain that, even though section 11-10.1 of the Probate act has not been “brought into conformity” like section 11a-10 of the Probate Act and section 506 of the Marriage and Dissolution of Marriage Act, courts in recent years have nonetheless appointed guardians *ad litem* to report on children’s best interests, as described in the Marriage Act, even in proceedings under article XI of the Probate Act. All told, the Illinois Supreme Court concluded that Fahrenkamp’s role int his case corresponded to a guardian *ad litem* as described in the current version of Marriage Act and *In re Mark*, and wrote, “[m]ost Illinois cases in the twenty-first century that involve a guardian *ad litem* treat that guardian *ad litem* as a reporter or a witness and not as an advocate.”

The court compared the cases cited by Nichols and Fahrenkamp; whereas Nichols relied on *Stunz*, from 1890, and *Simpson v. Doggett*, 159 S.C. 294, 156 S.E. 771 (1930), Fahrenkamp “rightly” relied on *In re Mark*, from 2008. In *In re Mark*, the Illinois Supreme Court had explained in 2008, “[t]he traditional role of the guardian ad litem is not to advocate for what the ward wants but, instead, to make a recommendation to the court as to what is in the ward's best interests.” This the court called “entirely consistent with the function of a guardian *ad litem* under the

current Marriage Act as an investigator and a 'witness' and with the circuit court's order in this case. Further, *In re Mark* allows the court to appoint a guardian *ad litem* based on its inherent authority, apart from any statutory provision. The court noted that the *Simpson* case from South Carolina on which Nichols relied was subsequently undermined in 1997 by the South Carolina Supreme Court. Finally, the court noted Supreme Court decisions from other states that have granted quasi-judicial immunity to a guardian *ad litem* who serves as a "best interests attorney," (New Mexico, 2014; South Carolina, 1997; Idaho, 1997; Washington, 1994), and similar cases from federal appellate courts, including the Seventh and Tenth Circuits.

While the court's holding applies to this case, as it deemed Fahrenkamp to be acting a "best interests attorney" – an "arm of the court," the court did suggest that this case "demonstrates why it is important for lower courts to make abundantly clear what each person's role is." "When a circuit court appoints someone to a position like guardian ad litem, it should specify that appointee's role in the order of appointment." It therefore presumably remains possible that a court could appoint a guardian *ad litem* to advocate for a ward, in which case the guardian *ad litem* may owe duties to the ward, as had been held here by the appellate court.

All seven Illinois Supreme Court justices who heard this case concurred in the opinion.

ESTATE TAX

1. <u>Baillie v. Raoul</u>, 2019 IL App (4th) 180655 (October 16, 2019).

Illinois state court denies fractional interest discount.

In *Baillie*, the Illinois Appellate Court in the Fourth District rejected the guidance of a Treasury Regulation and failed to respect the position of the IRS on the estate tax valuation question involved.

The case involves the valuation of John Baillie's one-half interest in three parcels of farmland that were owned by John and his wife, Glenda, as joint tenants with right of survivorship, which would be Section 2040(b) qualified joint interests. As a qualified joint tenancy, 50% of the value of that farmland would be includible in John's estate for federal estate tax purposes, and Illinois' estate tax piggybacks on the federal inclusion. However, John's one-half interests were the subject of a timely Section 2518 qualified disclaimer by Glenda, and John's one-half interests were included on the federal estate tax return under Section 2033, not 2040(b).

Under principles of state law, embraced at the federal level, Glenda's disclaimer related back to the time of John's death, it worked to convert the joint tenancy into a tenancy in common, and it caused John's half of each parcel to pass to their children through John's probate estate. Glenda was John's executor. The question litigated was the proper valuation of John's half interests for *Illinois estate tax purposes.*

The estate's valuation of the survivorship portion on the federal estate tax return reflected a 20% fractional interest discount, which was not challenged by the IRS. (The opinion does not reveal whether the estate was taxable at the federal level; John died in 2015 and the federal return may have been filed solely to elect portability.) Despite its acceptance of the federal return, the State of Illinois asserted that Internal Revenue Code Section 2040(b) was applicable notwithstanding the disclaimer, that the interest includible in John's estate was therefore valued under Section 2040(b)(1), meaning that an undiscounted 50% of the fair market value of the

joint tenancy property owned by John and Glenda at the moment of John's death was the proper amount includible in John's estate for Illinois estate tax purposes.

That valuation conclusion is inconsistent with Reg. §25.2518-2(c)(5), Examples 12 and 14, the important crux of which is a timing rule. A Section 2518 qualified disclaimer is deemed to relate back to the moment of death, which effectively treats Glenda and John as having severed their joint tenancy before John died, causing the property interest owned by John to pass through John's estate as if it were a tenant in common interest. These regulatory examples do not expressly articulate the valuation that applies to John's interest in the former joint tenancy, but they do state that the value of John's interest is, by virtue of the disclaimer, includible in John's gross estate under Section 2033, and not under Section 2040(b) as a qualified joint tenancy interest. That position was reached by the federal government after years of litigation regarding the effect of a surviving joint tenant's qualified disclaimer. Estate planners properly rely on the fully-litigated position, articulated by the regulations for federal estate tax purposes.

Because of these Treasury Regulations, the valuation of John's interest would naturally reflect the claimed fractional interest discount, as if the property was owned by John and Glenda as tenants in common. Glenda obtained appraisals of the farmland for purposes of filing John's estate tax return, which applied a 20% discount to the one-half interests included in John's estate. Glenda filed the federal return on that basis, and filed the Illinois return on that basis as well because the Illinois estate tax piggybacks on the federal estate tax return.

Indeed, the *Baillie* court expressly stated that "Illinois determines gross value the same way the federal government does. '[T]he gross value of transferred property … shall be its value as finally determined for purposes of the federal transfer tax.' 35 ILCS 405/5(c)." Nevertheless, the *Baillie* court concluded that the position reached for federal estate tax purposes, and the regulation examples upon which Glenda relied, are not entitled to judicial deference in this case.

The court cited Section 2033, which provides that "[t]he value of the gross estate shall include the value of all property to the extent of the *interest therein of the decedent at the time of his death.*" (emphasis added). The court then described the nature of joint tenancy in Illinois, and found that "the phrase 'at the time of his death' is a hole in the net of federal estate taxation." This is because a surviving joint tenant is left as the sole owner of the land, and "it is impossible for the deceased spouse (or his or her estate) to own any interest in a joint tenancy estate." Until a joint tenancy is severed, "the title and interest are not divided into fractional shares." Further, because there is no *transfer* of a joint tenancy interest at death, but the survivor automatically owns the whole, according to the court, no federal estate tax would be imposed on a decedent's extinguished joint tenancy interest but for the enactment of Section 2040. This analysis by the court ignores the relation-back in time theory associated with qualified disclaimers under Section 2518, and the federal law that has developed thereunder as expressed in the regulations.

The court acknowledged that the Treasury Regulations cited by Glenda were adopted by the Treasury in response to Seventh and Eighth Circuit Court of Appeals cases, *Kennedy v. Commissioner*, 804 F.2d 1332; and *McDonald v. Commissioner*, 853 F.2d 1494. The court also conceded that Glenda's disclaimer was a qualified disclaimer under Section 2518.

However, the court wrote that deference to regulations is "conditional: '[C]ourts will give substantial weight and deference to an interpretation of an *ambiguous* statute by the agency charged with the administration and enforcement of the statute." (citing *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142 (1983)) (emphasis in original). The

Illinois Appellate Court concluded, *de novo*, that Section 2518 is unambiguous. The Court likewise found section 2040(b) to be unambiguous.

Thus, because the joint tenancy owned by John and Glenda at the moment of death was a qualified joint tenancy, subject to Section 2040(b), the court's conclusion is that John's 50% is includible in John's gross estate, with no discount. "It is that simple" the court said. "Disclaiming the survivorship interest after the decedent's death cannot change how the property was held until the decedent's death." Rather, "[a]ll disclaiming a survivorship interest does is cause a distribution of the survivorship interest to some else at the decedent's death (see 755 ILCS 5/2-7(d) (West 2014)); it does not change how the property was held before the decedent's death.

Baillie is irrelevant for federal estate tax purposes. The Illinois court's denial of deference to the Treasury Regulation does nothing to diminish the effect of the regulation for federal estate tax purposes. But it is conceivable that other states may embrace the result in *Baillie*, and in any event Illinois planners may need to consider the best planning response to it. In Illinois (and perhaps elsewhere), spouses might prefer to sever their joint tenancies during life rather than rely on a qualified disclaimer by the surviving spouse postmortem. As an undivided tenancy in common, the probate avoidance attraction of joint tenancy would be lost, but probate could be avoided by holding a one-half tenant in common interest in trust.

One other implication of the disclaimer is avoidance of inclusion of both halves in the estate of the survivor, which is important only if the property will appreciate during the remaining life of the surviving spouse. In the final analysis, the basis of the disclaimed half in the first estate is smaller by virtue of the valuation discount applicable to an undivided tenancy in common versus a qualified joint tenancy. And the basis following the survivor's death is smaller because of the same valuation discount, and by avoiding inclusion in the survivor's estate of any appreciation in the predeceased spouse's half. As in much of estate planning today, these basis consequences may be the most meaningful consequences to consider.

2. <u>Raoul v. Dunston</u>, 2020 IL App (5th) 190017 (February 20, 2020)

Disclaimer does not have to be federal qualified disclaimer for purposes of Illinois-only QTIP election.

James R. Dunston passed away on May 2, 2014, with an estate plan that had he executed in 2007. James's surviving spouse and children were the successor co-trustees of his revocable trust, under which a Marital Trust and a Family Trust were created. James's revocable trust funded the Family Trust with the maximum amount that would result in no (or the least possible) federal estate tax, a provision which had not been changed since the decoupling of the federal and Illinois estate tax exemptions. The court noted, "*[a]s with many estate documents drafted before the changes in the law*, the Trust was not modified or amended after the law changed and before James's death."

The Family Trust created under James's revocable trust gave to Judy a lifetime power to appoint the assets of the trust among James's children and their spouses. Judy's lifetime power of appointment would disqualify the Family Trust from qualifying for a QTIP election under section 2056(b)(7) of the Internal Revenue Code.

James's spouse, Judy, as executor, filed an Illinois estate tax return for James's estate. Notwithstanding Judy's lifetime power of appointment over the Family Trust, James's Illinois

estate tax return reported a tentative taxable estate of $5,050,687.84 and made an Illinois QTIP election in the amount of $1,050,687.84.

The Attorney General determined that the Family Trust did not qualify for a QTIP election and assessed unpaid Illinois estate tax as of February 2, 2015. Over three years later, on June 20, 2018, the AG filed a complaint against Judy and the two children, individually and as co-trustees, claiming personal liability for estate tax and accrued interest of $398,516.

On July 19, 2018, more than four years after James's death and after the Attorney General's complaint was filed, Judy executed a written disclaimer of her lifetime power of appointment over the Family Trust pursuant to section 2-7 of the Probate Act, 755 ILCS 5/2-7. The disclaimer was effective retroactive to May 2, 2014, the date of James's death. Eight days later, on July 27, 2018, the defendants filed a motion to dismiss the Attorney General's complaint, on the basis that the Judy's disclaimer brought the Family Trust into compliance with Illinois QTIP requirements.

Unlike the Code, Illinois law does not provide a time limit for a disclaimer to be "qualified." A disclaimer under Illinois state law is barred by (1) a judicial sale of the property, part or interest before the disclaimer is effected; (2) an assignment, conveyance, encumbrance, pledge, sale or other transfer of the property, part or interest, or a contract therefor, by the disclaimant or his representative; (3) a written waiver of the right to disclaim; or (4) an acceptance of the property, part or interest by the disclaimant or his representative.

The circuit court dismissed the complaint, finding that the Judy's disclaimer was effective under Illinois law for estate tax purposes, and not governed by the timeliness provisions of section 2518 of the Code, and the Attorney General appealed.

The Fifth District Appellate Court affirmed the circuit court, framing the "sole issue" as "whether the circuit court correctly found that Judy's Disclaimer was not subject to the timeliness requirements set forth in section 2518 of the Federal Code (26 U.S.C. § 2518 (2018)), resulting in the Disclaimer being valid and the Illinois QTIP election being effective under Illinois law."

The Attorney General first argued that the estate failed to make a valid Illinois QTIP election by timely designating compliant property on its Illinois estate tax return because when it attempted to make the election on the Illinois return, the property was not federally QTIP eligible because Judy's lifetime power of appointment violated section 2056(b)(7)(B)(ii) of the Federal Code. The appellate disagreed and, since the circuit court had found that the disclaimer was effective retroactively under state law, considered any issue regarding the validity of the QTIP election in the absence of the disclaimer to be moot.

The Attorney General then argued that the circuit court erred in finding section 2518 of the Code inapplicable to Judy's disclaimer for purposes of determining the validity of an Illinois QTIP election. The court acknowledged that "the provision of the Illinois Estate Act that allows an Illinois QTIP election defines the election as one "under Section 2056(b)(7) of the [Federal Code]" and that Illinois QTIP elections are valid only to the extent that they are taken pursuant to that section." However, that same section (section 2(b-1)) of the Illinois Estate Tax Act also makes clear that an Illinois QTIP election is "separate and independent" from a federal QTIP election. The court wrote:

> The Attorney General aptly observes that the Illinois Estate Act adopted the Federal Code's definition of QTIP but then attempts to expand that to subject

> Illinois QTIP elections to the mandates of other sections of the Federal Code—particularly section 2518, which contains federal disclaimer limitations that govern federal QTIP elections. In essence, the Attorney General argues that, because section 2(b-1) of the Illinois Estate Act adopted the Federal Code's section 2056(b)(7) definition of QTIP, the federal disclaimer restrictions governing federal QTIP elections under section 2518 of the Federal Code are also applicable to Illinois QTIP elections, notwithstanding the "separate and independent" language in section 2(b-1) of the Illinois Estate Act and notwithstanding the fact that section 2(b-1) does not reference section 2518 of the Federal Code.

According to the court, although Illinois adopted the Code's definition of QTIP, it did not adopt the Code's provisions on disclaimers.

The Attorney General argued that, as a practical matter, taxpayers could generate a windfall through "inadvertent mistakes" in estate planning by waiting until after an audit to disclaim and noncompliant QTIP power. Had James's estate not been audited, "Judy would have been free to exercise the lifetime power to transfer the QTIP property out of her estate, perhaps avoiding Illinois estate tax at the time of her death or greatly complicating its collection." The court responded to this by saying that the lifetime power of appointment was not an "inadvertent mistake" *at the time the trust was drafted in 2007*. Moreover, Judy never exercised her power before disclaiming it, and Judy would have been barred from disclaiming the power if she had exercised it. Query, in the AG's example, wouldn't the exercise of Judy's lifetime power of appointment be a taxable gift or invoke section 2519 of the Code? What would have happened upon Judy's death had she never been audited, never executed the disclaimer, and died with an Illinois QTIP election in place for a trust that never qualified for it?

Finally, the Attorney General cited *Baillie* to support its argument that the Illinois disclaimer statute does not operate to treat the offending lifetime power of appointment as if it never existed. The court distinguished *Baillie*, first, because *Baillie* did not involve a question about the timeliness of a disclaimer. Further, the *Baillie* court relied heavily on the state law of joint tenancy, and the "only period of time when a joint tenancy can be severed" is before the other joint tenant dies. *Baillie*, 2019 IL App (4th) 180655, ¶ 37. Further, while *Baillie* involved a joint tenancy, this power in this case was transferred to the surviving spouse upon the decedent's death.

The court noted that "[m]aking funds available for a surviving spouse to live on and estate tax being deferred during the lifetime of the surviving spouse is a long standing public policy in Illinois," as indicated by the legislative history relating to the statute allowing the Illinois-only QTIP election. The court found its resolution in harmony with this "longstanding spirit of Illinois estate law."

3. <u>Carroll v. Raoul</u>, 2020 IL App (3d) 180550 (March 13, 2020)

Prior transfer credit does not reduce Illinois estate tax.

Carroll involved an estate's claim of a prior transfer credit to reduce Illinois estate tax. Carroll was executor of the estate of Sharon Maloney, who died on May 21, 2015 with an estate of about $6,570,000. Her mother and father both died within ten years prior to her death. Her mother's estate paid federal estate taxes of $66,993 and state estate taxes of $62,947; and her

father's estate paid federal estate taxes in the amount of $1,866,945 and Illinois estate taxes in the amount of $1,091,417.

The executor filed federal and state estate tax returns for Sharon's estate, claiming a credit on the Illinois return of $181,348.23 for prior estate taxes paid on the property transferred from her parents' estates. Section 2013 of the Internal Revenue Code allows a credit against federal estate tax for estate taxes paid on transfers of property to the (current) decedent by or from a person who died within 10 years before or 2 years after the decedent's death.

The Attorney General conducted an audit and determined that a prior transfer credit does not exist under the Illinois Estate Tax Act, and that the federal tax credit for prior transfers has no impact on the amount of Illinois estate tax due.

The estate paid $193,942 in taxes, penalties, and interest under the Protest Monies Act and then filed a complaint for declaratory and injunctive relief against the Attorney General and State Treasurer. The Attorney General moved to dismiss the complaint, and the trial court granted that motion, holding that the Estate Tax Act did not authorize use of the prior transfer credit to calculate the amount due for state tax purposes. The estate appealed.

The estate argued that a plain reading of the Illinois statute and federal tax code leads to an interpretation of the Estate Tax Act that allows for a prior transfer credit for state estate taxes. The estate also argued that the Attorney General's interpretation of the Estate Tax Act runs counter to prior representations and violates due process, and the denial of the prior transfer credit for state estate taxes violates the uniformity clause of the Illinois Constitution.

Looking first at the Illinois Estate Tax Act, the court concluded that the plain language of that act calculates the Illinois estate tax as the federal "state tax credit" as it existed in 2001 – as the "full credit calculable under section 2011 … of the Internal Revenue Code as the credit would have been computed and allowed under the Internal Revenue Code as in effect on December 31, 2001… but recognizing the exclusion amount of only … $4,000,000 for persons dying on or after January 1, 2013…." 35 ILCS 405/2(b) (West 2016).

Section 2011 of the IRC, as of December 31, 2001, provided as follows:

> The tax imposed *** shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect of any property included in the gross estate (*not including any such taxes paid with respect to the estate of a person other than the decedent*).

26 U.S.C. § 2011(a) (2000) (emphasis added).

The appellate court reasoned that there is no reference to section 2013 in section 2011 of the IRC. To the contrary, section 2011(a) specifically states that the credit for state death taxes does not include "any such taxes paid with respect to the estate of a person other than the decedent." The court noted that the payment of a state estate tax for the prior transfer of the same property by a parent's estate is a "tax[ ] paid with respect to the estate of a person other than the decedent." Thus, under federal law, a credit for prior transfers is not (or, was not as of 2001) permitted in the calculation of the state tax credit.

The estate also argued that the Attorney General's position is a change from a prior rule that violates due process. This was based on the estate's assertion that:

> the Attorney General told the Plaintiff that, in the case of a situation in which the estate was required to file an Illinois estate tax return but was not required to file a federal tax return, the State of Illinois would honor any election or credit that would be available on the federal return if the federal exemption were $4 million.

The court held, however, that the policy plaintiff was trying to enforce conflicts with the agency's enabling statutes, 35 ILCS 405/2(b), 3 (2016) and IRC § 2011 (2000). Even if the Attorney General had issued a regulation to allow a prior transfer credit, the Estate Tax Act would preclude the application of a prior transfer credit against the Illinois estate tax. The court also held that the Attorney General's denial of the prior transfer credit does not violate the Uniformity Clause of the Illinois constitution, since all estates are subject to a tax defined by the former federal state tax credit.

ILLINOIS PROPOSED BILLS

1. SB 3150: Transfer on Death Instruments

Synopsis As Introduced

Amends the Illinois Residential Real Property Transfer on Death Instrument Act. Renames the Act the "Real Property Transfer on Death Instrument Act". Changes the definitions of "owner" and "person". Deletes the definition of "residential real estate". Defines "real property". Changes references to "residential real estate property" to references to "real property". Permits the transfer of real property by a transfer on death instrument to a trustee of a trust under certain circumstances even if the trust is subject to amendment, modification, revocation, or termination. Provides that a transfer on death instrument may not be admitted to probate as the will of the owner or as a codicil thereto. Provides that a transfer on death instrument does not need to state consideration or the addresses of the beneficiaries. Provides that if the transfer on death instrument is not witnessed by at least 2 credible witnesses, it is void. Provides that if a beneficiary attests to the execution of the transfer on death instrument, the interest transferred to that beneficiary is void as to that beneficiary. Changes the rules under which real property that is subject to a transfer on death instrument is transferred. Provides that a transfer on death instrument may be renounced by the owner's surviving spouse regardless of whether the transfer on death instrument transfers an interest in real property for the benefit of the surviving spouse. Provides that a creditor may enforce the liability against the real property transferred at the owner's death by a transfer on death instrument and the beneficiaries. Makes other changes to provisions regarding: rights of creditors; limitations; and preparation of a transfer on death instrument or its revocation. Makes conforming changes.

Status: 3/5/2020 Senate Committee Amendment No. 2 Assignments Refers to Judiciary

2. SB 3153: Revised Uniform Unclaimed Property Act

Synopsis As Introduced

Amends the Revised Uniform Unclaimed Property Act. Provides that virtual currency is presumed abandoned if it is unclaimed by the apparent owner 5 years after the last indication of interest in the property. Provides that a provision regarding when a tax-deferred retirement account is presumed abandoned also applies to a tax-exempt retirement account. Provides that property held in a pension account or retirement account that qualifies for tax deferral or tax exemption may be presumed abandoned if, among other criteria, it is unclaimed by the apparent owner 3 years after the date the apparent owner becomes 72 (rather than 70.5) years of age. Provides that a business association that has no reportable property shall report to the State Treasurer if the business association has: (1) annual sales of more than $1,000,000; (2) securities that are publicly traded; (3) a net worth of more than $10,000,000; or (4) more than 100 employees. Provides that the State Treasurer does not need to notify the Department of Revenue of the names or social security numbers of apparent owners of abandoned property under certain circumstances. Provides for the identification of apparent owners of abandoned property using databases of the Secretary of State and the State Board of Elections. Provides for the delivery of reportable virtual currency to the State Treasurer. Makes other changes.

Status: 3/4/2020 Senate Committee Amendment No. 1 Assignments Refers to Judiciary

3. HB 4251: Probate Act; Person Causing Death

Synopsis As Introduced

Amends the Descent and Distribution Article of the Probate Act of 1975. Creates Pam's Law. Provides that a person who intentionally and unjustifiably causes the death of another is disqualified from being: (1) a personal representative of the decedent; (2) the executor or administrator of the decedent's estate; and (3) the person who has the right to determine the method for disposing of the body. Provides that in any case in which a preponderance of the evidence shows that the surviving spouse or next of kin caused the death of another, the court may disqualify the spouse or next of kin on an interim basis and appoint a special administrator for the limited purpose of investigating, presenting, and proving a claim. Provides that the Act applies retroactively to any death caused by intentional and unjustifiable means that is still subject to prosecution under any applicable criminal statute of limitations.

Status: 3/4/2020 House Placed on Calendar 2nd Reading - Short Debate

4. HB 4611: ABLE Accounts

Synopsis As Introduced

Amends the State Treasurer Act. Provides that upon the death of a designated beneficiary, proceeds from an ABLE account may be transferred pursuant to a payable on death account agreement executed by the designated beneficiary or designated representative. Effective immediately.

Status: 3/4/2020 House Placed on Calendar Order of 3rd Reading - Short Debate

5. HB 4445: Real Estate Transfer Tax

Synopsis As Introduced

Amends the Property Tax Code. Provides that, on and after January 1, 2021, deeds representing real estate transfers of residential property from a parent to a child are exempt from the real estate transfer tax if the child's household income for the taxable year in which the transfer occurs is less than $50,000 and the property has been the child's principal place of residence for at least 10 consecutive years immediately prior to the date of the transfer. Effective immediately.

Status: 3/12/2020 House Assigned to Revenue & Finance Committee

6. HB 4842: Creates the Supported Decision-Making Agreement Act

Synopsis As Introduced

Creates the Supported Decision-Making Agreement Act. Authorizes the creation of supported decision-making agreements and allows a supporter to assist a principal in accessing,

collecting, or obtaining information that is relevant to a decision authorized under the supported decision-making agreement. Provides that all adults are presumed to be capable of managing their affairs and to have capacity unless otherwise determined by a court. Provides that certain persons are disqualified from acting as a supporter. Provides that a supporter may exercise the authority granted to the supporter in the supported decision-making agreement. Provides for the duties of a supporter in a supported decision-making agreement. Prohibits a supporter from doing certain actions in relation to the principal. Requires a notary public or 2 or more witnesses to be present and sign and date a supported decision-making agreement. Provides a form for a supported decision-making agreement. Provides that a person is not subject to criminal or civil liability and has not engaged in professional misconduct for an act or omission under certain circumstances. Provides that a decision or request made or communicated with the assistance of a supporter shall be recognized as the decision or request of the principal and may be enforced by the principal or supporter on the same basis as a decision or request of the principal. Provides that if a person who receives a copy or is aware of the existence of a supported decision-making agreement and has cause to believe that the principal is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Adult Protective Services Hotline. Provides for the termination of a supported decision-making agreement. Provides that a principal may revoke the supported decision-making agreement and invalidate the supported decision-making agreement at any time. Provides that a supporter may resign by giving notice to the principal. Effective immediately.

Status: 3/17/2020 House Assigned to Judiciary - Civil Committee

7. SB 3012: Petition for Appointment of Temporary Guardian

Synopsis As Introduced

Amends the Guardians For Adults With Disabilities Article of the Probate Act of 1975. Provides that a petition for the appointment of a temporary guardian for an alleged person with a disability shall be filed at the time of or subsequent to the filing of a petition for adjudication of disability and appointment of a guardian. Provides that the petition for the appointment of a temporary guardian shall state specific facts. Provides that notice of the time and place of the hearing on a petition for the appointment of a temporary guardian or petition to revoke the appointment of a temporary guardian shall be given not less than 3 days before the hearing.

Status: 3/5/2020 Senate Placed on Calendar Order of 3rd Reading March 18, 2020

8. SB 3417: Conveyances Act; Electronic Records and Delivery

Synopsis As Introduced

Amends the Conveyances Act. Provides that if the Act requires information to be in writing or delivered in writing, or provides for consequences if it is not, an electronic record or electronic delivery satisfies that requirement. Provides that if the Act requires a deed, instrument, record, or other document or information to be executed, signed, or subscribed to in writing, an electronic signature or digital signature satisfies that requirement. Effective immediately.

Status: 2/25/2020 Senate Assigned to Judiciary

9. SB 3351: Limitation on Attorney Malpractice

Synopsis As Introduced

Amends the Code of Civil Procedure. Provides that an attorney malpractice action in which the injury did not occur until the death of the person for whom the professional services were rendered may not be commenced in any event more than 6 years after the date the professional services were performed. Provides, with exceptions, that the changes apply to every cause of action, regardless of the date that the cause of action accrues.

Status: 3/5/2020 Senate Committee Amendment No. 1 Assignments Refers to Judiciary

10. HB 4626: Delayed Revocation of Health Care Power of Attorney

Synopsis As Introduced

Amends the Illinois Power of Attorney Act. Provides that a principal may elect a 30-day delayed revocation of the principal's health care agency. Makes a corresponding change. Effective immediately.

Status: 3/13/2020 House To Civil Procedure Subcommittee

11. HB 4050: Guardianship Reports

Synopsis As Introduced

Amends the Guardians For Adults With Disabilities Article of the Probate Act of 1975. Provides that the requirement that one of the persons listed in a report for a petition for adjudication of disability and for appointment of a guardian who performed evaluations upon which the report is based may be a licensed person who has treated or advised the respondent or assessed the respondent's relevant physical or mental condition (instead of only a licensed physician).

Status: 1/31/2020 House To Family Law Subcommittee
2/4/2020 House Committee Amendment No. 1 Filed with Clerk by Rep. Daniel Didech
2/4/2020 House Committee Amendment No. 1 Referred to Rules Committee
2/5/2020 House Committee Amendment No. 2 Filed with Clerk by Rep. Daniel Didech
2/5/2020 House Committee Amendment No. 2 Referred to Rules Committee
2/18/2020 House Committee Amendment No. 2 Rules Refers to Judiciary - Civil Committee
2/26/2020 House Committee Amendment No. 2 To Family Law Subcommittee
3/6/2020 House Committee Amendment No. 3 Filed with Clerk by Rep. Daniel Didech
3/6/2020 House Committee Amendment No. 3 Referred to Rules Committee

12. SB 2796: Guardianship Reports

Synopsis As Introduced

Amends the Guardians for Adults with Disabilities Article of the Probate Act of 1975. Provides that one of the persons who performed the evaluations upon which the report relating to the adjudication of disability is based shall be a licensed physician or a licensed clinical psychologist (rather than "shall be a licensed physician"). Provides that the report in support of a verified petition to allow a ward to execute a will or codicil may be from a licensed clinical psychologist (rather than only a current physician).

Status: 3/4/2020 Senate Placed on Calendar Order of 2nd Reading March 5, 2020

NON-ILLINOIS CASES

STATE INCOME TAXATION OF TRUSTS

1. North Carolina Dept. of Revenue v. Kimberly Rice Kaestner 1992 Family Trust, 139 S. Ct. 2213 (June 21, 2019).

A state statute that taxes trust income solely on the basis of the residence of a beneficiary violates the Due Process Clause as applied.

The U.S. Supreme Court affirmed the decision of the North Carolina Supreme Court in *Kimberley Rice Kaestner 1992 Family Trust v. North Carolina Dept. of Revenue*, 814 S.E.2d 43 (N.C. June 8, 2018).

The United States Supreme Court granted the North Carolina Department of Revenue's petition for a writ of certiorari on January 11, 2019. Oral argument was held on April 16. On June 21, 2019 the U.S. Supreme Court issued a unanimous opinion, delivered by Justice Sotomayor, holding that as applied to the Trust the North Carolina statute subjecting the Trust to state income taxation on the sole basis of a trust beneficiary's residence in the state violates the Due Process Clause. The first paragraph of the opinion is an excellent synopsis:

> This case is about the limits of a State's power to tax a trust. North Carolina imposes a tax on any trust income that "is for the benefit of" a North Carolina resident. N. C. Gen. Stat. Ann. §105–160.2 (2017). The North Carolina courts interpret this law to mean that a trust owes income tax to North Carolina whenever the trust's beneficiaries live in the State, even if – as is the case here – those beneficiaries received no income from the trust in the relevant tax year, had no right to demand income from the trust in that year, and could not count on ever receiving income from the trust. The North Carolina courts held the tax to be unconstitutional when assessed in such a case because the State lacks the minimum connection with the object of its tax that the Constitution requires. We agree and affirm. As applied in these circumstances, the State's tax violates the Due Process Clause of the Fourteenth Amendment.

Clearly the result is a taxpayer victory. But, does the Court's opinion shed any further light on the broader issue: in what circumstances does the state taxation of undistributed trust income satisfy the Due Process Clause? Notably, as the Court states in its footnote 8, "[w]e do not decide what degree of possession, control, or enjoyment would be sufficient to support taxation." Consider the various reasons the Court cites in its opening paragraph, and develops further in its opinion, that the mere residence of the beneficiaries in North Carolina does not supply the required "minimum connection" necessary to support state taxation of the trust.

First, the beneficiaries did not actually receive any income during the years in question. What if they had received some but not all of the distributable income?

Second, "the beneficiaries had no right to demand trust income or otherwise control, possess, or enjoy the trust assets in the tax years at issue." The trustee had "absolute discretion" in deciding when, whether, and to whom distributions would be made. The Court emphasizes that "[c]ritically, this meant that the trustee had exclusive control over the allocation and timing of trust distributions." Distributions could be made to one beneficiary to the exclusion of others,

“with the effect of cutting one or more beneficiaries out of the Trust.” What if distributions were governed by a standard involving, for example, the health, education, support, or maintenance of the beneficiary? Moreover, the trustee and not beneficiaries made investment decisions. A spendthrift clause prevented beneficiaries from assigning their interests in trust property to anyone. What if there were no spendthrift clause? In footnote 9 the Court answers that “[w]e do not address whether a beneficiary’s ability to assign a potential interest in income from a trust would afford that beneficiary sufficient control or possession over, or enjoyment of, the property to justify taxation based solely on his or her in-state residence.” While the trust agreement directs the trustee to be liberal in exercising its distribution discretion and the trustee could not act in bad faith or from some improper motive, the beneficiaries still could not demand distributions or direct that Trust assets be used for their benefit.

Third, the beneficiaries “could not count on necessarily receiving a specific amount of income from the Trust in the future.” While the trust had been scheduled to terminate in 2009, the trustee, under the New York decanting statute, had distributed the trust assets to a new trust with a later termination date. As a result of these facts, as the Court states in its footnote 10, “one might characterize the interests of the beneficiaries as ‘contingent’ on the exercise of the trustee’s discretion.” The Court adds, predictably, that “[w]e have no occasion to address, and thus reserve for another day, whether a different result would follow if the beneficiaries were certain to receive funds in the future.”

Giving still more emphasis to these three negative points, the Court summarizes:

> The beneficiaries received no income from the Trust, had no right to demand income from the Trust, and had no assurance that they would eventually receive a specific share of Trust income. Given these features of the Trust, the beneficiaries’ residence cannot, consistent with due process, serve as the sole basis for North Carolina’s tax on trust income.

The Court rejected North Carolina’s counterarguments. For example, the Court stated (footnotes omitted, emphasis added):

> [T]he State argues that ruling in favor of the Trust will undermine numerous state taxation regimes. Tr. of Oral Arg. 8, 68; Brief for Petitioner 6, and n. 1. Today’s ruling will have no such sweeping effect. North Carolina is one of a small handful of States that rely on beneficiary residency as a sole basis for trust taxation, and one of an even smaller number that will rely on the residency of beneficiaries regardless of whether the beneficiary is certain to receive trust assets. Today’s decision does not address state laws that consider the in-state residency of a beneficiary as one of a combination of factors, that turn on the residency of a settlor, or that rely only on the residency of noncontingent beneficiaries, see, e.g., Cal. Rev. & Tax. Code Ann. §17742(a). We express no opinion on the validity of such taxes.

And in a footnote following its citation of the California statute, the Court elaborates on an ominous theme that had arisen at oral argument: “The Trust also raises no challenge to the practice known as throwback taxation, by which a State taxes accumulated income at the time it is actually distributed. See, e.g., Cal. Rev. & Tax. Code Ann. §17745(b).” Whether trustees and beneficiaries of trusts with California contacts should be frightened or reassured by this attention may be a question, as the Court put it, they must “reserve for another day.”

As if there were any remaining doubt about the narrowness of the Court's opinion, Justice Alito, joined by Chief Justice Roberts and Justice Gorsuch, wrote a concurring opinion for the purpose, as he described it in his first paragraph, "to make clear that the opinion of the Court merely applies our existing precedent and that its decision not to answer questions not presented by the facts of this case does not open for reconsideration any points resolved by our prior decisions."